

87-1157

No.

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1987

THE ALASKA FEDERATION OF NATIVES, THE
ASSOCIATION OF VILLAGE COUNCIL
PRESIDENTS, and TONY VASKA,

Petitioners,

vs.

THE ALASKA FISH AND WILDLIFE
FEDERATION AND OUTDOOR COUNCIL, INC.,
THE ALASKA FISH AND WILDLIFE
CONSERVATION FUND, INC., FRANK L. DUNKLE,
Director, United States Fish and Wildlife Service,
and DONALD COLLINSWORTH, Commissioner
of the Alaska Department of Fish and Game,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

I. Subsequent to 1925, did the Alaska Game Act, Pub. L. No. 68-320, 43 Stat. 739 (1925) (reprinted as amended at 48 U.S.C.A. §§ 192-211), and regulations adopted pursuant to that Act, govern the taking of migratory waterfowl in Alaska?

II. If the answer to question no. I, is yes, did the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) (reprinted at 48 U.S.C. prec. § 21), repeal the Alaska Game Act insofar as the latter Act, and regulations adopted pursuant to that Act, govern the taking of migratory waterfowl in Alaska?

III. Did the court of appeals have jurisdiction to determine whether § 3(h)(2) of the Fish and Wildlife-Improvement Act, 16 U.S.C. § 712(1) (1978), delegates the Secretary of the Interior authority to adopt regulations authorizing the indigenous inhabitants of Alaska to take migratory waterfowl during seasons of the year, i.e., spring and summer, during which migratory bird treaties with Canada and Mexico prohibit the taking of migratory waterfowl?

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Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
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Petitioners Alaska Federation of Natives, et al., respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on October 9, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 829 F.2d 933, and is reprinted in the appendix (App.) at App. 1.

The memorandum decision of the United States District Court for the District of Alaska (von der Heydt, J.) is not reported. The decision is reprinted at App. 33.

JURISDICTION

Respondents Alaska Fish and Wildlife Federation and Outdoor Council, Inc. and Alaska Fish and Wildlife Conservation Fund, Inc. (collectively Outdoor Council) filed an action in the United States District Court for the District of Alaska against the state and federal respondents. The petitioners intervened, and, invoking federal jurisdiction under 28 U.S.C. § 1331, filed a cross-claim seeking declaratory relief against the federal respondent. On January 24, 1986, the district court entered a final judgment, granted the petitioners' request for declaratory relief and dismissed the Outdoor Council complaint.

On October 9, 1987, the Court of Appeals for the Ninth Circuit reversed, dismissed the cross-claim and remanded the case to the district court to adjudicate the merits of the Outdoor Council claims. No petition for rehearing was sought.

The jurisdiction of this Court to review the opinion of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Alaska Game Act, Pub. L. No. 68-320, 43 Stat. 739 (1925) (reprinted as amended at 48 U.S.C.A. §§ 192-211) (pertinent text set forth at App. 66).

Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918) (current version at 16 U.S.C. §§ 703-711) (pertinent text set forth at App. 69).

Fish and Wildlife Improvement Act, § 3(h)(2), 16 U.S.C. § 712(1) (1978). (pertinent text set forth at App. 71).

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STATEMENT OF THE CASE

This case presents questions of first impression regarding the intent of Congress embodied in statutes governing the taking of ducks, geese and other migratory waterfowl in Alaska.

Alaska is unique in that it is the only one of the 50 states in which such a significant number of residents, most of whom are Indians, Eskimos and Aleuts (Alaska Natives), depend upon the harvest of fish, game, waterfowl and plants for their sustenance. As the House Committee on Interior and Insular Affairs noted as recently as 1978: "There are more than 200 rural communities throughout Alaska. In many, fresh meat, fish and produce are unavailable except through the subsistence harvest." House Report No. 1045, Part I, 95th Cong., 2d Sess. 182 (1978) [hereinafter House Report].

In recognition of this special circumstance, Congress has consistently taken care to ensure that conservation legislation affecting Alaska does not disrupt traditional Native subsistence hunting and fishing activities. See Walrus Act, Pub. L. No. 77-219, 55 Stat. 632 (1941) (Native subsistence hunting exempted from prohibition on

taking walrus); Marine Mammal Protection Act, § 101 (b), 16 U.S.C. § 1371(b) (1972) (Native subsistence hunting exempted from moratorium on taking marine mammals); Endangered Species Act, § 10(e)(1), 16 U.S.C. § 1539(e)(1) (1973) (Native subsistence hunting exempted from restrictions on taking endangered and threatened species); Alaska National Interest Lands Conservation Act, §§ 801-816, 16 U.S.C. §§ 3111-3126 (1980) (title establishing a priority for subsistence hunting and fishing on public lands in Alaska). *See also* House Conference Report No. 746, 92d Cong., 1st Sess. 37 (1971) ("The Conference Committee expects both the Secretary [of the Interior] and the State [of Alaska] to take any action necessary to protect the subsistence needs of the Natives.").

Of all Alaska Natives, none are more dependent upon subsistence hunting and fishing than the Yup'ik Eskimo people who live in villages on the Yukon-Kuskokwim River delta, a vast, fan-shaped expanse of low tundra which stretches some 250 miles from Norton Sound immediately north of the mouth of the Yukon River to the Kilbuck Mountains south of Kuskokwim Bay. The delta is an internationally significant summer nesting ground for migratory waterfowl, including four species of arctic nesting geese (cackling Canada, white-fronted and emperor geese and black brant) which are important subsistence resources. As the district court found below: "The species traditionally have been hunted by Natives during the spring for subsistence, and this hunting continues. As explained by the Native intervenors, the arrival of the migrating birds represents the first available fresh meat after the long winter and they therefore are an important part of the Native diet." App. 34.

Unfortunately for Alaska Natives, although migratory waterfowl are only present in Alaska during spring and summer, for reasons unrelated to the Native subsistence harvest, by the turn of the century spring and summer hunting had become the subject of considerable controversy in the lower 48 states where sport and market hunters, particularly on Chesapeake Bay and in the mid-western states, had shot some migratory waterfowl populations to the brink of extinction. Although conservationists opposed spring and summer hunting, in 1900 hunting was considered an activity within the exclusive regulatory purview of the states, and conservationists had little influence in most state legislatures. But the federal government governed Alaska and conservationists had considerably more influence in Congress. As a result, the first Alaska Game Act enacted in 1902 prohibited the taking of migratory waterfowl between December 15th and September 1st. However, in doing so, Congress was careful to exempt Alaska Natives hunting for food from compliance with the closed season. Pub. L. No. 57-147, 32 Stat. 327 (1902). An arrangement Congress continued when it reenacted the Alaska Game Act in 1908. Pub. L. No. 60-111, 35 Stat. 102 (1908).

In 1913 Congress preempted state jurisdiction and authorized the Department of Agriculture to prepare, and the President to adopt, regulations governing the taking of migratory waterfowl throughout the United States. Pub. L. No. 62-430, 37 Stat. 828, 847 (1913). Regulations implementing the 1913 Act prohibited the taking of migratory waterfowl during spring and summer. 38 Stat. 1960 (1913). Significantly, the regulations did not apply to

Alaska where the 1908 Alaska Game Act already prohibited spring and summer hunting.

The constitutionality of the 1913 Act was immediately challenged. See *United States v. Shauver*, 214 F. 154 (D. Arkansas 1914), *appeal dismissed*, 248 U.S. 594 (1919); *United States v. McCullagh*, 221 F. 288 (D. Kansas 1915). To bolster the constitutionality of the Act before the litigation reached this Court, the Department of Agriculture urged the Department of State to negotiate a migratory bird treaty with Canada. The Department of State negotiated a treaty whose text is near identical to the text of the regulations implementing the 1913 Act, including the regulations prohibiting spring and summer hunting. The treaty was ratified in 1916. Convention for the Protection of Migratory Birds, August 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628.

The treaty is not self-executing. As a result, in 1918 Congress enacted the Migratory Bird Treaty Act (MBTA) which authorized the Secretary of Agriculture (Secretary)¹ to adopt regulations governing the taking of migratory waterfowl and required the regulations to be consistent with the provisions of the treaty. Pub. L. No. 65-186, 40 Stat. 755 (1918) (current version at 16 U.S.C. §§ 703-

¹The Bureau of Biological Survey was the agency within the Department of Agriculture responsible for implementing both the MBTA and the Alaska Game Act. In 1939 the Bureau moved to the Department of the Interior. Reorg. Plan No. II, § 4 (f), 4 Fed. Reg. 2731, 53 Stat. 1433 (1939). Consequently, all references to "Secretary" in the instant petition which refer to events subsequent to July 1, 1939, refer to the Secretary of the Interior, rather than the Secretary of Agriculture.

711). The constitutionality of the MBTA was upheld in *Missouri v. Holland*, 252 U.S. 416 (1920).

Although the Canadian treaty exempts Alaska Natives from compliance with closed seasons on the taking of sea birds, unlike the 1902 and 1908 Alaska Game Acts, the treaty does not exempt Natives from compliance with closed seasons on the taking of migratory waterfowl. As a result, the district court concluded that "Congress intended the MBTA [rather than the 1908 Alaska Game Act] to apply to subsistence hunting [of migratory waterfowl] in Alaska." App. 38.

However, in 1925 Congress enacted a new Alaska Game Act. Pub. L. No. 68-320, 43 Stat. 739 (1925) (reprinted as amended at 48 U.S.C.A. §§ 192-211). Section 8 of the Act, 48 U.S.C.A. § 195, prohibited the taking of game, fur-bearing animals and wild birds "unless and except as permitted by this Act or by regulations made pursuant to this Act." Section 2, 48 U.S.C.A. § 206, defined "take" to include the taking or killing of "game birds," and defined "game birds" to include "migratory waterfowl, commonly known as ducks, geese, brant, and swans." Section 10, 48 U.S.C.A. § 198, authorized the Secretary to adopt regulations governing the taking of game birds in Alaska, but prohibited the Secretary from adopting regulations that "contravene any of the provisions of the migratory bird treaty Act and regulations." Lastly, and most importantly, § 10 exempted Indians and Eskimos from compliance with regulations establishing closed seasons, including regulations establishing closed seasons for the taking of game

birds, in situations in which they were "in absolute need of food" and did not have other food available.²

The court of appeals determined that the regulations the Secretary adopted in 1925 to implement the Alaska Game Act are ambiguous as to whether the Department of Agriculture believed Congress intended the Alaska Game Act or the MBTA to govern the Secretary's authority to adopt regulations authorizing the taking of migratory waterfowl in Alaska. App. 27. However, in 1944 the Secretary adopted a regulation which, by administrative fiat, wrote "game birds" out of the Act. 50 C.F.R. § 91.3 (1944), *printed at* 9 Fed. Reg. 5270-5271 (1944). See App. 48-49.

Despite the regulation, between 1918 and 1960 there is no record of any Alaska Native having been cited for taking migratory waterfowl for food during closed seasons established by regulations adopted pursuant to either the Alaska Game Act or the MBTA. Indeed, a 1969 report on Native subsistence migratory waterfowl hunting which the United States Fish and Wildlife Service (FWS) commissioned and which the federal respondent submitted to the district court as his own exhibit concludes that between 1925 and Alaska statehood in 1959 FWS assumed that § 10

²In 1940 the "in absolute need of food" standard was amended to allow Natives to hunt during closed seasons when they or their families are in need of food "and other sufficient food is not available." Pub. L. No. 76-836, 54 Stat. 1103 (1940). The committee report explaining the change indicates that Congress intended the 1940 amendment to expand the emergency take provision in the 1925 Act into a broad Native subsistence hunting exemption similar to the Native subsistence hunting exemption in the Marine Mammal Protection Act. See House Rept. No. 2746, 76th Cong., 3d Sess. (1940).

of the Alaska Game Act exempted Native subsistence hunters from compliance with regulations establishing closed seasons. The author of the report, Albert Day, joined FWS's predecessor agency, the Bureau of Biological Survey, in 1918, and from 1946 to 1953 served as the Director of FWS when it was known as the Bureau of Sport Fisheries and Wildlife. After reviewing internal memoranda, and based upon 51 years of experience with the agency that implemented both the MBTA and the Alaska Game Act, former director Day concluded that:

To now assume—45 years later—that the Eskimo, Indian, traveler exemption [in the Alaska Game Act] was capricious, would beg the evidence of history. Rather, it must be assumed that these implementing regulations were adopted with full approval of the legal and legislative authorities of the day as consistent with the Migratory Bird Treaty Act. The administration of the Alaska Game Law proceeded without conflict with the Natives of Alaska until the Statehood Act of 1958 repealed that Act and the regulations thereunder. There is no record of anyone ever challenging the Alaska Game Law on this point.

Federal Defendant's Ex. A at 93.

In 1959 Alaska was admitted to the federal union as the 49th state. Proclamation No. 3269, 24 Fed. Reg. 81 (1959). However, Congress did not transfer the new state authority to regulate the taking of fish and game within its borders until 1960. Alaska Statehood Act, §6(e), Pub. L. No. 85-508, 72 Stat. 339 (1958) (reprinted at 48 U.S.C. prec. § 21); Exec. Order No. 10,857, 25 Fed. Reg. 33 (1960). Significantly, when regulatory authority was transferred,

the federal government retained authority to regulate the taking of migratory waterfowl. *See* Senate Rept. No. 1929, 81st Cong., 2d Sess. 14 (1950). *See also* App. 51-52. Nevertheless, that spring FWS enforcement officers began arresting Native hunters for taking migratory waterfowl during spring and summer seasons closed by regulations adopted pursuant to the MBTA.

In May 1961 the new enforcement policy became a national issue when an Inupiat Eskimo was arrested near Point Barrow for hunting ducks during the closed season and the next day 100 Inupiat, each in the possession of an eider duck, demanded to be arrested. When the Alaska congressional delegation protested the new policy, Assistant Secretary of the Interior Frank Briggs responded that "treaty provisions give the Department no recourse but to carry out a progressive program of enforcement." *See generally* 107 Cong. Rec. 18,416-25 (1961).

For the next 11 years Native subsistence hunters were sporadically arrested for hunting migratory waterfowl during spring and summer seasons closed by regulations adopted pursuant to the MBTA. A generation of hunters grew to manhood believing that for reasons they did not understand Congress had criminalized an important Native subsistence activity, and a generation of congressmen and FWS employees completed their tenure of public service believing the same, i.e., that no matter how unfair, Congress intended Native subsistence hunting to be subject to regulations adopted pursuant to the MBTA, and the MBTA prohibited the Secretary from adopting regulations establishing spring and summer seasons for Native subsistence hunting since the migratory bird treaties to which

the United States was party³ prohibited hunting during the spring and summer.

To remedy the problem, the Department of State negotiated a migratory bird treaty with Japan which was ratified in 1972. Convention for the Protection of Migratory Birds and Birds in Danger of Extinction and Their Environment, March 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990. Article III, ¶ 1(e) of the treaty exempts Indians and Eskimos who take migratory waterfowl for food or clothing from compliance with regulations establishing closed seasons. In 1976 the Department of State negotiated, and in 1978 the Senate ratified, a migratory bird treaty with the Soviet Union which authorizes the United States to allow the "indigenous inhabitants of the State of Alaska" to take migratory waterfowl for nutritional and other essential needs during any season of the year. Convention Concerning the Conservation of Migratory Birds and Their Environment, November 19, 1976, United States-USSR, 29 U.S.T. 4647, T.I.A.S. No. 9073. The same year Congress added an amendment to the Fish and Wildlife Improvement Act which, "in accordance with the various migratory bird treaties and conventions with Canada, Japan, Mexico, and the Union of Soviet Socialist Republics," delegates the Secretary au-

³In 1936 the United States entered into a migratory bird treaty with Mexico. Convention for the Protection of Migratory Birds and Game Mammals, February 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912. Like the Canadian treaty, the Mexican treaty is not self-executing. Rather, pursuant to Article II of the treaty, the United States government agreed to establish laws and regulations establishing a closed season on the taking of ducks between March 10 and September 1. The treaty makes no mention of Native subsistence hunting.

thority to adopt regulations authorizing such takings. Fish and Wildlife Improvement Act, § 3(h)(2), 16 U.S.C. § 712(1) (1978).

However, subsequent to the enactment of §3(h)(2), FWS announced that, as it interpreted the intent of Congress embodied in the statute, the Secretary was prohibited from adopting regulations pursuant to this new authority until the Canadian and Mexican treaties are amended to authorize subsistence hunting during the spring and summer. An amendment to the Canadian treaty was negotiated in 1979 and sent to the Senate for ratification late in 1980. Protocol Amending the 1916 Convention with Canada for the Protection of Migratory Birds, January 30, 1979, Senate Doc. Executive W, 96th Cong., 2d Sess. (1980). However, immediately upon assuming office in 1981, Secretary James Watt requested the Committee on Foreign Relations to delay action on the amendment to enable the Department of the Interior to review objections raised by several sportsmen's organizations. Intervenor's Ex. B. The request was granted, and seven years later the Department is still reviewing the matter.

In the meantime, in 1983 FWS acquired data which indicated that three species of geese that nest on the Yukon-Kuskokwim River delta (cackling Canada and white-fronted geese and black brant) were exhibiting a statistical population decline. After reviewing the evidence, the district court found that loss of habitat in the lower 48 states, predation by foxes and other predators and sport and Native subsistence hunting had contributed to the decline. App. 34. Of the list, hunting is the only variable that lends itself to quick governmental intervention.

However, FWS (having decided in 1944 not to regulate Native subsistence hunting pursuant to the Alaska Game Act, and having decided in 1978 that Native subsistence hunting could not be regulated pursuant to § 3(h)(2) of the Fish and Wildlife Improvement Act until the Senate ratifies treaty amendments such as the amendment Secretary Watt requested not be ratified) found itself without the regulatory tools needed to discharge its statutory responsibilities.

As a result, FWS asked the Yup'ik Eskimo people of the Yukon-Kuskokwim River delta to voluntarily limit their subsistence harvest of the three species. After an historic series of negotiations, in January 1984 petitioner Association of Village Council Presidents (AVCP), FWS, and the Alaska and California Departments of Fish and Game developed the Hooper Bay Agreement.⁴ The National Audubon Society also supported the Agreement.

Pursuant to the Hooper Bay Agreement, FWS and the California Department of Fish and Game agreed to adopt regulations reducing sport hunting and to acquire new winter habitat. Petitioner AVCP agreed to request the Eskimo residents of the Yukon-Kuskokwim River delta not to gather eggs, not to hunt cackling Canada geese at any time, and not to hunt white-fronted geese and black

⁴In 1985 AVCP, FWS and the Alaska and California Departments of Fish and Game negotiated a new agreement called the Yukon-Kuskokwim Delta Goose Management Plan (YDGMP). Similar in content to the Hooper Bay Agreement, the YDGMP added emperor geese to the list of migratory waterfowl populations subject to the agreement. Since 1985, the YDGMP has been renewed annually.

brant while the birds were nesting, molting or rearing their young.

Shortly thereafter, respondent Outdoor Council filed a complaint in the district court against the state and federal respondents which alleged *inter alia* that the Hooper Bay Agreement authorized Native hunters to take migratory waterfowl in violation of regulations establishing closed seasons adopted pursuant to the MBTA. The Outdoor Council also requested a preliminary injunction ordering FWS to enforce MBTA regulations against Native hunters. The petitioners intervened and the district court denied the motion. In doing so, the court held that "There is a public interest in both protecting the subsistence lifestyle of the Natives and protecting the populations of the bird species," and that "The Hooper Bay Agreement represents the first comprehensive effort to stop the decline of the species." App. 63.

The petitioners then filed a cross-claim against the federal respondent. The cross-claim alleged that Congress intended the Secretary to regulate the taking of migratory waterfowl in Alaska through regulations adopted pursuant to the Alaska Game Act, rather than the MBTA, and that the Alaska Game Act exempts Native subsistence hunters from compliance with regulations establishing closed seasons. The cross-claim further alleged that the Alaska Statehood Act did not repeal the provisions of the Alaska Game Act relating to the taking of migratory waterfowl. Lastly, the cross-claim alleged that the Secretary's conclusion that § 3(h)(2) of the Fish and Wildlife Improvement Act prohibits the adoption of regulations authorizing indigenous inhabitants of the State of Alaska

to take migratory waterfowl until amendments to the Canadian and Mexican treaties are ratified was error.

The parties filed cross-motions for summary judgment. On January 24, 1986, the district court issued a memorandum decision and a final judgment denying the respondents' motions, granting the petitioners' motion in part and dismissing the Outdoor Council claims. The district court held that the Alaska Game Act, rather than the MBTA, controls the adoption of regulations governing the taking of migratory waterfowl in Alaska, and that the Act exempts Native subsistence hunters from compliance with regulations establishing closed seasons. The court further held that the Alaska Statehood Act did not repeal the Alaska Game Act insofar as the latter Act governs the taking of migratory waterfowl. Lastly, the court refused to decide whether the Secretary presently has authority to adopt regulations pursuant to § 3(h)(2) of the Fish and Wildlife Improvement Act. App. 33-60.

On an appeal filed by respondent Outdoor Council,⁵ the court of appeals reversed. The court held that the MBTA, rather than the Alaska Game Act, controls the adoption of regulations governing the taking of migratory waterfowl in Alaska, and that, unlike the Alaska Game Act, the MBTA does not exempt Native subsistence hunters from compliance with regulations establishing closed seasons. The court further held that, assuming *arguendo* it was controlling, the Alaska Game Act has been repealed by the Alaska Statehood Act. Lastly, the court

⁵The state and federal respondents did not appeal the district court decision.

held that § 3(h)(2) of the Fish and Wildlife Improvement Act prohibits the Secretary from adopting regulations authorizing the taking of migratory waterfowl during the spring and summer until amendments to the Canadian and Mexican treaties are ratified. App. 1-32.



REASONS FOR GRANTING THE WRIT

- 1. The Court of Appeals Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.**

The intent of Congress embodied in the MBTA, the Alaska Game Act and the Alaska Statehood Act is a question of first impression and considerable public importance.

In 1980 Congress designated the Yukon-Kuskokwim River delta as the Yukon Delta National Wildlife Refuge. Alaska National Interest Lands Conservation Act (ANILCA), § 303(7), Pub. L. No. 96-487, 94 Stat. 2371 (1980). It did so primarily because of the delta's value as summer nesting habitat. According to the House Committee on Interior and Insular Affairs: "Over 50,000 swans, 700,000 geese and 2,300,000 ducks depart the Yukon Delta area each fall—figures which are significant internationally, as these birds migrate to all of North America and to other regions bordering the Pacific Ocean." House Report at 119.

Because of their concern for the protection of migratory waterfowl and wildlife populations upon which

their way of life depends, the Yup'ik Eskimo residents of the 34 villages within its boundaries strongly supported the establishment of the refuge. *Id.* ("The fish and wildlife resources of this wildlife range are essential to the traditional lifestyles of the area's 11,000 Native residents. Native support for the area has been resounding. . . ."). In recognition of the importance of Native subsistence hunting and fishing, Congress designated "the opportunity for continued subsistence uses by local residents" as a purpose of the Yukon Delta National Wildlife Refuge. ANILCA, § 303(7)(B)(iii).

But the Native subsistence migratory waterfowl harvest is not unique to the Yukon-Kuskokwim River delta. At the time it established the Yukon Delta National Wildlife Refuge, Congress established or enlarged 15 other refuges in Alaska. *See generally* ANILCA, §§ 302-303. And in almost every case, it did so out of concern for both the conservation of migratory waterfowl and the well-being of Alaska Natives who depend upon the subsistence harvest of migratory waterfowl and wildlife populations on refuge lands. To list but three examples: 109 species of migratory waterfowl from six continents nest on the Selawik National Wildlife Refuge in the northwest arctic, 117 species nest on the Yukon Flats National Wildlife Refuge in interior Alaska, and the Arctic National Wildlife Refuge in the northeast corner of Alaska is an important summer nesting ground for black brant. House Report at 107, 111, 116.

Native villages are located within or proximate to the aforementioned refuges, and migratory waterfowl hunting is an important Native subsistence activity within each

refuge. Like the Yukon Delta National Wildlife Refuge, Congress designated "the opportunity for continued subsistence uses by local residents" as a purpose of the aforementioned refuges, as well as all but one of the other refuges it established or enlarged in 1980.⁶

As result, if the instant petition is granted, the ultimate holding in this litigation will affect Alaska Natives in more than 200 villages, from Klawock, a Tlingit Indian village on the southern edge of the southeast Alaska rain forest, to Kaktovik, an Inupiat Eskimo village on the wind-swept coast of the Beaufort Sea in the northeastern corner of Alaska more than 1,000 miles north. It will also affect hundreds of migratory waterfowl populations other than the four which are the subject of the Hooper Bay Agreement and the YDGMP.

2. The Court of Appeals Decided a Question of Federal Law in a Way Which Conflicts with an Important Decision of This Court.

In addition to the public importance of the subject matter, the instant petition should be granted for a second reason: to correct the flawed methodology the court of appeals employed to determine the intent of Congress embodied in the Alaska Game Act; a methodology which is in conflict with an important decision of this Court.

Chevron, U.S.A., Inc. v. N.R.D.C., 467 U.S. 837 (1984), sets forth the test for determining the intent of Congress

⁶At the same time, Congress established or enlarged 13 national parks and preserves and designated "subsistence uses by local residents" as an authorized activity in most areas. ANILCA, §§ 201-202.

embodied in a statute. Justice Scalia has characterized *Chevron* as “an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeal.” *I.N.S. v. Cardoza Fonseca*, 107 S.Ct. 1207, 1225 (1987) (Scalia, J. concurring).

In the instant case, the issue before the court of appeals was whether Congress intended the Secretary to regulate the taking of migratory waterfowl in Alaska pursuant to the Alaska Game Act, or pursuant to the MBTA. If Congress intended the Alaska Game Act to control, the Act exempts Native subsistence hunters from compliance with regulations establishing closed seasons.

Chevron required the court of appeals to analyze the text of the Alaska Game Act to determine whether Congress has directly spoken to the precise question at issue. If it has, and the intent of Congress is clear and unambiguous in the text, then regardless of FWS’s interpretation of the Act “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, supra* at 842-843.

However, in reasoning to its preferred result, the court of appeals disregarded *Chevron*. The text of the Alaska Game Act is clear and unambiguous. Section 8, 48 U.S.C.A. § 195, prohibits any person to take any wild bird in Alaska “except as permitted by this Act or by regulations made pursuant to this Act.” Section 2, 48 U.S.C.A. § 206, defines “take” to include the taking or killing of “game birds,” and defines “game birds” to include “migratory waterfowl, commonly known as ducks, geese, brant, and swans.” Section 10, 48 U.S.C.A. § 198, authorizes the Secretary to adopt regulations governing

when, to what extent, and by what means "game birds" may be taken. Lastly, and most importantly, § 10 requires regulations adopted pursuant to the Alaska Game Act not to "contravene any of the provisions of the migratory bird treaty Act and regulations."

It is simply impossible to read the text of the Act and conclude other than that Congress, having directly spoken to the precise question at issue, intended the Alaska Game Act, and regulations adopted pursuant to that Act, to control the taking of migratory waterfowl in Alaska. Nevertheless, the court of appeals decided otherwise. First, by asserting that "The 1925 AGL was ambiguous as to its relationship with the MBTA." App. 23. And then by relying on FWS's interpretation of the Act, even though it conceded at the outset of its analysis that "The interpretation of the statute by the Secretary is also ambiguous." App. 27.

Simply put, the court of appeals ignored elemental tenets of statutory construction set forth in *Chevron* to reach a result inconsistent with the clear and unambiguous text of an Act of Congress.⁷ An error this Court should correct.

⁷The court of appeals' conclusion that the Alaska Statehood Act repealed the Alaska Game Act insofar as the latter Act delegates the Secretary authority to adopt regulations governing the taking of migratory waterfowl in Alaska is similarly flawed. See App. 49-52.

3. The Court of Appeals Has Rendered a Decision That Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings As to Call for the Exercise of This Court's Power of Supervision.

The jurisdiction of the federal courts is limited to the adjudication of "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. Since 1978 the petitioners and the federal respondent have disagreed as to whether § 3(h)(2) of the Fish and Wildlife Improvement Act, 16 U.S.C. § 712(1) (1978), delegates the Secretary authority to adopt regulations authorizing the indigenous inhabitants of the State of Alaska to take migratory waterfowl during spring and summer prior to the ratification of amendments to the Canadian and Mexican treaties. The petitioners believe the statute confers this authority. The Secretary did not.

To settle the matter, the petitioners' cross-claim requested the district court to adjudicate the dispute. However, the court declined the invitation. Since the authority to adopt regulations pursuant to § 3(h)(2) is discretionary, the district court concluded that until such time as the Secretary chose to exercise his discretion and adopt regulations "There is no case or controversy in this area. Any opinion would be advisory in nature, the issues not being ripe for decision." App. 53.

None of the parties appealed this holding. As a result, the issue was not briefed or argued before the court of appeals. In the meantime, while the appeal was pending, the Solicitor of the Department of the Interior re-evaluated the intent of Congress embodied in § 3(h)(2). On May 19, 1986, FWS published a notice in the Fed-

eral Register announcing its intent "to propose regulations governing subsistence harvest of migratory birds in Alaska. These regulations will be based on provisions for such harvest in various laws, including the Fish and Wildlife Improvement Act of 1978. It is intended that the regulations will be adopted by spring of 1987. . . ." 51 Fed. Reg. 18,349 (1986).

Although FWS did not complete the rulemaking prior to the 1987 season, it intended to do so prior to the 1988 season. But the court of appeals derailed the effort. *See* 52 Fed. Reg. 49,449 (1987). Although it had not been asked to decide the question, the court gratuitously held that "the legislative history regarding the Fish and Wildlife Improvement Act makes clear that regulations permitting closed season hunting may not be adopted if they are contrary to any of the treaties." App. 19.

As the district court correctly concluded, the court of appeals decision that the Secretary does not presently have authority pursuant to § 3(h)(2) to adopt regulations authorizing the taking of migratory waterfowl in Alaska during the spring and summer is an advisory opinion. As such, it is an opinion the court had no jurisdiction to render. *Bell v. State of Maryland*, 378 U.S. 226, 273 (1964) (holding that the United States Supreme Court has a "constitutional inability to render advisory opinions.'). *See also Buckley v. Valeo*, 424 U.S. 1, 11 (1982) (holding that Congress cannot require the courts to render opinions in matters that are not "cases or controversies.').

The aforementioned component of the court of appeals decision is a significant, indeed startling, departure from the accepted and usual course of judicial proceedings. As such, it calls for the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: January 7, 1988

Respectfully submitted,

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE ALASKA FISH AND WILDLIFE
FEDERATION AND OUTDOOR
COUNCIL, INC., and THE ALASKA
FISH AND WILDLIFE CONSERVATION
FUND, INC.,

Plaintiffs-Appellants,

v.

FRANK L. DUNKLE, Director,
United States Fish and Wildlife
Service, and DONALD
COLLINSWORTH, Commissioner of
the Alaska Department of Fish
and Game,

Defendants-Appellees,

THE ALASKA FEDERATION OF
NATIVES, THE ASSOCIATION OF
VILLAGE COUNCIL PRESIDENTS, and
TONY VASKA,

Intervenors-Appellees.

No. 86-3657

D.C. No.
CV-84-013-V

OPINION

Argued and Submitted
November 7, 1986—Seattle, Washington

Filed October 9, 1987

Before: Otto R. Skopil, Jr. and Betty B. Fletcher, Circuit
Judges, and John P. Vukasin, Jr.,* District Judge.

*Honorable John P. Vukasin, Jr., United States District Judge,
Northern District of California, sitting by designation.

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Opinion by Judge Skopil

Appeal from the United States District Court
for the District of Alaska

James A. von der Heydt, District Judge, Presiding

SUMMARY

Environmental Law/Administrative Law

Appeal from judgment. Reversed and remanded.

The hunting of migratory birds has resulted in a decline in their population. Appellee Fish and Wildlife Service has assumed that all harvesting of migratory birds between March 10 and September 1 of each year is prohibited by the Migratory Bird Treaty Act (MBTA). Enforcement was difficult. The Service adopted a policy stating that subsistence hunting in Alaska during the closed season would not be punished. In an effort to decrease sport and subsistence hunting during the closed season, the Service initiated negotiations with Alaskan Natives. A cooperative plan to reduce the hunting of three types of migratory birds was agreed to. This plan, the Hooper Bay Agreement, placed restrictions on subsistence hunting but did not prohibit it. In 1985 the Hooper Bay Agreement was replaced by a similar agreement, the 1985 Goose Management Plan. Shortly before the 1984 nesting season began, appellant Alaska Fish and Wildlife Conservation Fund filed legal action against the Service and the Alaska Department of Fish and Game (ADF&G) alleging that by entering into the Hooper Bay Agreement, the Service illegally permitted Alaskan Natives to engage in closed season hunting. It contended that this action violated the Migratory Bird Treaty Act (MBTA). The appellee Intervenor then filed a cross-claim against the

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Service alleging that the 1925 Alaska Game Law (AGL) superseded the MBTA. It argued that Congress has, pursuant to the 1925 AGL, authorized Alaskan Natives to harvest migratory waterfowl during all seasons of the year if they are in need of food. The district court denied the Conservation Fund's request for a preliminary injunction. All parties' motions for summary judgment were stayed. In 1986 the court granted summary judgment in favor of the Intervenors.

[1] Appellants have satisfied the three prongs for standing. [2] A decision not to enforce a law is generally committed to an agency's absolute discretion. However, an agency's failure to act is reviewable where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. [3] The MBTA grants the Secretary of the Interior discretion to regulate the taking of migratory birds, but that discretion is limited to actions in accordance with the treaties the MBTA implements. This court has jurisdiction to determine whether the agency action was contrary to the provisions of the treaties, and thus to the MBTA. [4] This action is one of those cases in which the complained of activity may be repeated and yet evade review. [5] The MBTA makes all hunting of migratory birds unlawful unless the hunting is authorized by regulation adopted pursuant to the MBTA. [6] The legislative history makes clear that regulation permitting closed season subsistence hunting may not be adopted if they are contrary to any of the treaties. [7] The Secretary of the Interior is authorized to issue regulations permitting subsistence hunting, but only to the extent that the regulations are in accord with all four treaties. [8] All treaties protect the

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migratory birds covered by the Hooper Bay Agreement and the 1985 Goose Management Plan. [9] Reviewing all the treaties, closed season subsistence hunting by Alaskan Natives is not permitted by the MBTA. [10] Because the MBTA prohibited all hunting of migratory birds between March 10 and September 1 of each year and the 1925 AGL permitted emergency subsistence during the entire year, the district court found that the clauses conflicted. The conflict was resolved by finding the 1925 AGL Superseded the MBTA with respect to the regulation of migratory birds hunting. [11] It is possible, however, to interpret the two clauses in section 10 so that they do not conflict and so that both provisions serve a purpose. [12] Subsequent administrative interpretation supports the view that the 1925 AGL did not supersede the MBTA and that the emergency hunting provision in the 1925 AGL did not govern the hunting of migratory game birds.

COUNSEL

Gregory F. Cook, Douglas, Alaska, for the plaintiffs-appellants.

James C. Kilbourne, Edward J. Shawaker, and J. Carol Williams, Washington, D.C., for Director, United States Fish and Wildlife Service, David A. Gayer, Washington, D.C., of counsel. Larri Irene Spengler, Juneau, Alaska, for the appellee State of Alaska.

Donald C. Mitchell, Anchorage, Alaska, for the intervenors-appellees.

OPINION

SKOPIL, Circuit Judge:

The Alaska Fish and Wildlife Conservation Fund and the Alaska Fish and Wildlife Federation and Outdoor Council ("the Conservation Fund"), appeal the district court's dismissal of its claims against defendants, Frank L. Dunkle, Director of the United States Fish and Wildlife Service ("Fish and Wildlife Service"), and Donald Collinsworth, Commissioner of the Alaska Department of Fish and Game ("ADF&G"). The Conservation Fund also appeals the district court's grant of summary judgment in favor of intervenors, the Alaska Federation of Natives, the Association of Village Council Presidents, and Alaska State Representative Tony Vaska ("Intervenors"), on their cross claims against the defendants.

The Conservation Fund seeks a declaration that two cooperative agreements (the "Hooper Bay Agreement" and the "1985 Goose Management Plan") entered into by the Fish & Wildlife Service, the ADF&G, the Association of Village Council Presidents, and the California Department of Fish and Game are void. They contend that the Fish & Wildlife Service failed to follow federal procedures before entering into the agreement and that the Hooper Bay Agreement and the 1985 Goose Management Plan illegally permitted closed season hunting by Alaskan Natives. As applied to subsistence hunting of migratory birds in Alaska, the district court determined that the 1925 Alaska Game Law ("1925 AGL"), 43 Stat. 739, superseded the 1918 Migratory Bird Treaty Act ("MBTA"), 40 Stat. 755 (codified at 16 U.S.C. §§ 703-711 (1982)). It held that a provision in the 1925 AGL preventing the De-

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partment of Agriculture from placing restrictions on subsistence hunting continues in force today. For this reason, the district court concluded that the Fish and Wildlife Service has no authority to place restrictions on subsistence hunting by Alaskan Natives.

We first consider the procedural claims raised by the Fish and Wildlife Service and ADF&G. We conclude that the Conservation Fund has standing to pursue its claims and that a decision in favor of the Conservation Fund would not infringe on the prosecutorial discretion of the Fish and Wildlife Service. We also conclude that this action is not moot.

We reverse the district court's decision as to the applicability of the 1925 AGL to the hunting of migratory game birds in Alaska. We hold that the MBTA governs the hunting of migratory birds and that the MBTA currently does not permit closed season subsistence hunting of migratory game birds by Alaskan Natives. We remand to the district court to determine whether the Hooper Bay Agreement and the 1985 Goose Management Plan violate the provisions of the MBTA.¹

¹We do not resolve whether the government's failure to comply with the notice and comment provisions of the Administrative Procedure Act or the National Environment Policy Act invalidates the Hooper Bay Agreement or the 1985 Goose Management Plan. Those issues must first be resolved by the district court.

Nor is it necessary for us to determine whether the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 668dd, provides an independent basis for restricting subsistence hunting. Having determined that the MBTA requires the government to comply with its international treaty obligations, we do not need to consider whether ANILCA also places this obligation on the government in its operation of the Yukon Delta National Wildlife Refuge.

FACTS AND PROCEEDINGS BELOW

This case concerns the hunting of migratory birds on the Yukon-Kuskokwim Delta ("Delta"). In early March, migratory birds, including Cackling Canada Geese, White Fronted Geese, Pacific Black Brant, and Emperor Geese, arrive on the Delta. During the spring and summer months the birds nest and raise their young. In early September the birds migrate south.

The birds represent an important part of the traditional Native diet. Upon arrival in the spring, the migratory birds provide Delta Natives with the first available fresh meat after the long winter.

Hunting by Delta Natives, along with hunting by sportsmen, loss of habitat, and natural predation, has resulted in a decline in the migratory bird population. This decline has concerned conservationists since the turn of the century and has become increasingly severe. All parties agree that extraordinary measures are necessary to reverse the current trend.

The Fish and Wildlife Service has assumed that all harvesting of migratory birds between March 10 and September 1 of each year is prohibited by the MBTA. In recent years, however, the Fish and Wildlife Service has not made an effort in Alaska to ensure compliance with the MBTA. Political and geographical considerations have led the Service to conclude that traditional methods of enforcing game laws are not effective in the vast reaches of rural Alaska. In 1975 the Service adopted a written policy stating that subsistence hunting in Alaska during the closed season would not be punished.

In an effort to decrease sport and subsistence hunting during the closed season, the Fish and Wildlife Service initiated negotiations with Alaskan Natives. In January 1984 the Fish and Wildlife Service, the ADF&G, the Association of Village Council Presidents, and the California Department of Fish and Game agreed to a cooperative plan to reduce the hunting of three types of migratory birds. This plan, known as the Hooper Bay Agreement, prohibited sport hunting of Cackling Canadian Geese and reduced the hunting of White Fronted Geese and Black Brants during the 1985 hunting season. The Agreement placed restrictions on subsistence hunting, but did not prohibit this activity. Enforcement of the Hooper Bay Agreement was to be accomplished jointly by the various governmental agencies and local village councils. During 1984 the parties complied with the terms of the Agreement. In 1985 the Hooper Bay Agreement was replaced by a similar agreement, the 1985 Goose Management Plan.

Shortly before the 1984 nesting season began, the Conservation Fund filed legal action against the Fish and Wildlife Service and the ADF&G. The Conservation Fund alleged that by entering into the Hooper Bay Agreement, the Fish and Wildlife Service illegally permitted Alaskan Natives to engage in closed season hunting. It contended that this action violated the MBTA, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559 (1982), and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4361 (1982). The Conservation Fund sought an injunction to prohibit the Fish and Wildlife Service from acquiescing in the taking of migratory birds during the 1984 closed hunting season. It also requested declaratory relief to require the Fish and Wildlife Ser-

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vice to comply with APA and NEPA before entering into further agreements and to develop a comprehensive plan for reducing the harvest of the endangered species.

Shortly thereafter, the Intervenor filed a cross-claim against the Fish and Wildlife Service. The cross-claim alleged, in relevant part, that the 1925 AGL rather than the MBTA governs the subsistence hunting of migratory game birds in Alaska. The Intervenor argued that the 1925 AGL superceded the MBTA and that until the Secretary of the Interior adopts regulations pursuant to the 1978 Fish and Wildlife Improvement Act ("Fish and Wildlife Improvement Act"), 16 U.S.C. § 712 (1982), Congress has, pursuant to the 1925 AGL, authorized Alaskan Natives to harvest migratory waterfowl during all seasons of the year if they or members of their family are in need of food and other sufficient food is not available.

The district court denied the Conservation Fund's request for a preliminary injunction for the 1984 season. All parties then filed motions for summary judgment. In the spring of 1985 the district court stayed the case through the 1985 nesting season. The district court ordered the Fish and Wildlife Service and the Intervenor to report to the court regarding the effectiveness of the 1985 Goose Management Plan. The reports were received, and in January 1986 the court granted summary judgment in favor of the Intervenor.

The court ruled that the Fish and Wildlife Service may not restrict subsistence hunting activities by Alaskan Natives. It concluded that the 1925 AGL repealed the MBTA insofar as the MBTA applied to Alaska. It held, however, that all of the MBTA's terms except for its re-

striction on subsistence hunting were incorporated into the 1925 AGL. Because the 1925 AGL permitted subsistence hunting by Alaskan Natives and no subsequent legislation modified the subsistence hunting provision in the 1925 AGL, the district court held that the Hooper Bay Agreement and the 1985 Goose Management Plan had no legal effect. The court declined to address whether the Secretary has authority under the Fish and Wildlife Improvement Act to restrict subsistence hunting because the Fish and Wildlife Service has not yet issued regulations pursuant to that Act. The district court concluded that the Conservation Fund's APA and NEPA claims were moot because the two agreements had no legal effect.

The Conservation Fund argues that the district court incorrectly found that the 1925 AGL superceded the MBTA with respect to subsistence hunting of migratory birds in Alaska. It seeks a declaratory ruling that the Hooper Bay Agreement and the 1985 Goose Management Plan are contrary to the MBTA because they permit subsistence hunting. The Conservation Fund also seeks to compel the Fish and Wildlife Service to adopt measures restricting subsistence hunting. Although the Fish and Wildlife Service and ADF&G argued below that the 1925 AGL does not supersede the MBTA, they have not appealed the district court's decision. They argue instead that the Conservation Fund does not have standing to challenge the participation of the Fish and Wildlife Service in cooperative agreements concerning subsistence hunting of migratory birds. In the alternative, they argue the action should be dismissed because the Conservation Fund seeks to infringe on the prosecutorial discretion of the Fish and Wildlife Service.

DISCUSSION

I.

A. *Standing.*

The Fish and Wildlife Service and ADF&G argue that the Conservation Fund's claims should be dismissed for lack of standing. Although argued, the issue of standing was not addressed in the district court's decision. Standing is a threshold question in every case. *Olagues v. Russoniello*, 797 F.2d 1511, 1517 (9th Cir. 1986) (en banc), cert. granted, 107 S.Ct. 1885 (1987).

[1] The test for standing is not precise. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Nevertheless, we have some guidance. A plaintiff's claim must include three allegations: (1) a personal injury, (2) which is fairly traceable to the defendant's allegedly unlawful conduct, and (3) which is likely to be redressed by the requested relief. *Id.*

Courts have found personal injury in a variety of settings in which recreational or aesthetic uses of natural resources are at stake. Non-economic criteria are as valid a measure of personal injury as economic criteria. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *Port of Astoria v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979); *Trustees for Alaska v. Watt*, 524 F. Supp. 1303, 1307 (D. Alaska 1981), aff'd, 690 F.2d 1279 (9th Cir. 1982). A plaintiff must allege use of the resources in a way that will be significantly affected by the proposed actions. See *Sierra Club*, 405 U.S. at 735. In this case the Conservation Fund alleged a personal injury to its members. The decrease in the number

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of certain species of migratory birds has harmed the environment. The harm has injured those who wish to hunt, photograph, observe, or carry out scientific studies on the migratory birds. These injuries can be measured in both economic and non-economic terms.

The Conservation Fund has also shown that the injury of which it complains is traceable to the actions of the defendants and that there is a substantial likelihood that declaratory relief would redress the injury. The requirement of a causal link and redressability are closely related. *See Railway Labor Executives Ass'n v. Dole*, 760 F.2d 1021, 1023 (9th Cir. 1985); *see also Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72-78 (1978). If, as alleged by the Conservation Fund, the Hooper Bay Agreement and the 1985 Goose Management Plan permit illegal subsistence hunting, the injury is traceable to the actions of the government. The parties do not dispute the district court's finding that subsistence hunting is one cause of the decline in the migratory bird population. There is a substantial likelihood that declaratory relief in the form of a declaration that close-season subsistence hunting violates federal law will redress the injury.

The Conservation Fund is also a proper representative of those who are injured. An association may enjoy standing on behalf of its members if: “ ‘(a) it members would otherwise have standing in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.’ ” *International Union, Auto. Aerospace & Agricultural Implement Workers v. Brock*, 106

S. Ct. 2523, 2529 (1986) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). All three prongs of the test are satisfied. First, the Conservation Fund's members use the resources in question and have been injured by the decrease in the migratory bird population. Second, preventing the extinction of migratory gamebirds is germane to the association's purpose of participating in "litigation in the courts when necessary to protect the beneficial pursuits of hunting . . . and scientific wildlife management practices." Third, because the Fund seeks declaratory and prospective relief rather than money damages, its members need not participate directly in the litigation. See *Alagues*, 797 F.2d at 1519.

The Conservation Fund has adequately established that it is a proper representative of the injured and that the injury suffered is traceable to the defendants. The relief requested, although not a complete solution, would help to prevent the current decline in the migratory population. Appellants have standing to pursue their claim.

B. *Discretion to Prosecute.*

[2] The Fish and Wildlife Service and the ADF&G argue that the Conservation Fund's claims should be dismissed because any result in favor of the Fund would infringe on the enforcement and prosecutorial discretion of the Service. Failure of an agency to prosecute is presumptively not reviewable under the APA. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); see also *Railway Labor Executives Ass'n*, 760 F.2d at 1024-25. In *Chaney*, the Supreme Court held that the presumption of reviewability normally accorded to agency actions does not apply to an agency's decision not to prosecute or enforce a law. *Cha-*

ney, 470 U.S. at 831-32. A decision not to enforce a law is generally committed to an agency's absolute discretion. *Id.* An agency's failure to act is reviewable "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833 (footnote omitted).

The Conservation Fund contends that the Fish and Wildlife Service has abrogated its statutory duty to enforce the closed hunting season required by the MBTA. To the extent that the Service's failure to act is the basis of the Conservation Fund's claim, we lack jurisdiction under the APA to consider the claim. The MBTA explicitly delegates the authority to adopt regulations and discretionary enforcement powers to the Secretary of the Interior. See 16 U.S.C. §§ 704, 712. The discretion granted to the Fish and Wildlife Service precludes our review of the Service's failure to enforce the MBTA.

[3] The Conservation Fund does not, however, rely solely on the Fish and Wildlife Service's failure to enforce the MBTA as the basis for its claim. It also complains that by entering into the Hooper Bay Agreement and the 1985 Goose Management Plan the Fish & Wildlife Service violated the MBTA. Such actions are reviewable, see *Chaney*, 470 U.S. at 831; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), unless the agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(2). The MBTA grants the Secretary of the Interior discretion to regulate the taking of migratory birds, but that discretion is limited to actions in accordance with the treaties the MBTA implements. See 16 U.S.C. 712(1). We have jurisdiction to determine whether the agency action, entry into the Hooper Bay Agreement and the 1985

Goose Management Plan, was contrary to the provisions of the treaties and thus to the MBTA.

C. *Mootness*

The Hooper Bay Agreement was signed in 1984 and governed the 1985 hunting season. The 1985 Goose Management Plan replaced the Hooper Bay Agreement and remained in force until the end of 1986. We have not been informed whether any agreement was entered into for the 1987 season but do not believe this to be a relevant factor. The 1985 district court decision that the Fish & Wildlife Service had no authority to restrict subsistence hunting by Alaskan Natives would have made any cooperative agreement unenforceable.²

“Judicial review of administrative action . . . is limited by the requirement that there be an actual, live controversy to adjudicate.” *Campesino Unidos, Inc. v. United States Dep’t of Labor*, 803 F.2d 1063, 1067 (9th Cir. 1986) (citing *Iron Arrow Honor Soc’y v. Heckler*, 464 U.S. 67, 72-73 (1983)). We recognize an exception to the mootness doctrine if the government’s actions are capable of repetition but will evade review. *See, e.g., Olagues*, 797 F.2d at 1516. The doctrine is limited to extraordinary cases in which: “(1) the duration of the challenged action is too short to be fully litigated before it ceases; and (2) there

²ADF&G argues that the issuance by the Fish and Wildlife Service of a notice of its intent to propose regulations for subsistence harvesting of migratory birds pursuant to the 1978 Fish and Wildlife Improvement Act indicates that the issues involved in the case will soon be moot. *See* 51 Fed. Reg. 18,349-50 (1986); 51 Fed. Reg. 26,029 (1986). The Fish and Wildlife Service has not issued the expected regulations. We therefore decline to reach this issue.

is a reasonable expectation that the plaintiffs will be subjected to the same action again." *Id.* Moreover, "[t]he existence of a 'public interest in having the legality of the practices settled . . . militates against a mootness conclusion.' " *Id.* at 1517 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

[4] This action is one of those extraordinary cases in which the complained of activity may be repeated and yet evade review. First, the cooperative agreements challenged in this action were of only one year's duration. It is difficult to obtain judicial review during the duration of a one-year agreement. Second, we find that the Conservation Fund has met its burden of showing a sufficient likelihood that there will continue to be injurious actions relating to the official sanctioning of closed-season hunting. *See Olagues*, 797 F.2d at 1516 (holding that "voluntary cessation of the challenged activity is insufficient to render a case moot if the legality of the challenged practices' is still disputed because '[t]he [official] is free to return to his old ways' " (quoting *W.T. Grant Co.*, 345 U.S. at 362)). *See generally, Sample v. Johnson*, 771 F.2d 1335, 1340-43 (9th Cir. 1985) (discussing injury requirement), *cert. denied*, 106 S. Ct. 1206 (1986). In addition, questions concerning the authority of the Fish and Wildlife Service to regulate the subsistence hunting of migratory birds are likely to recur each year if not settled by this court. *See United States v. Oregon*, 769 F.2d 1410, 1414 (9th Cir. 1985) (and cases cited therein) (dispute concerning fishing regulations adopted annually not moot). Finally, the public interest in having this dispute resolved is strong. The parties are unsure which laws govern the

subsistence hunting of migratory game birds in Alaska. Unless the law is clarified it may not be possible to develop a program that addresses the population decline of migratory birds.

II.

The Fish and Wildlife Service has assumed that the hunting of migratory birds in Alaska is governed by the MBTA and its implementing regulations. See 16 U.S.C. §§ 701-712; 50 C.F.R. §§ 20.1-20.155 (1987). Neither the MBTA nor the implementing regulations permit subsistence hunting of migratory game birds by Alaska Natives during the closed season. The district court concluded, however, that a provision in the 1925 AGL which prohibited the adoption of regulations restricting subsistence hunting unless the hunted species was in danger of extinction remains in force today. Despite a convincing argument that the 1925 AGL was repealed when Alaska became a state, the district court held that the subsistence hunting provision continues in force today.

A. *Standard of Review.*

A grant of summary judgment is reviewed de novo. *Alaska v. Lyng*, 797 F.2d 1479, 1481 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1603 (1987). We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any issues of material fact and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). The construction of a statute is a question of law reviewable de novo. *Lyng*, 797 F.2d at 1481.

App. 18

The 1918 Migratory Bird Treaty Act

The MBTA was enacted in 1918 to implement a convention between the United States and Great Britain protecting migratory birds. See Convention for the Protection of Migratory Birds, August 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628 [hereinafter United States-Canada Convention]. By enacting the MBTA, Congress obtained regulatory authority over migratory birds which previously had been held by the individual states. See *Missouri v. Holland*, 252 U.S. 416 (1920). The MBTA has since been amended to implement conventions which the United States has signed with Mexico, Japan, and the Soviet Union. See Convention for the Protection of Migratory Birds and Game Mammals, February 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912; Convention for the Protection of Migratory Birds and Birds In Danger of Extinction and Their Environment, March 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990; Convention Concerning the Conservation of Migratory Birds and Their Environment, November 19, 1976, United States-USSR, 29 U.S.T. 4647, T.I.A.S. No. 9073.

[5] The MBTA makes all hunting of migratory birds unlawful unless the hunting is authorized by regulations adopted pursuant to the MBTA. 16 U.S.C. § 703. The statute authorizes the Secretary of the Interior to adopt regulations governing the hunting of migratory birds. 16 U.S.C. § 704. The Secretary is granted broad discretion in determining the content of the regulations, but is subject to the provisions and the purposes of the conventions. *Id.* The Department of the Interior is also granted enforcement powers. 16 U.S.C. § 706.

App. 19

The MBTA was amended in 1978 by the Fish and Wildlife Improvement Act to implement the United States-USSR Convention. The amendment added for the first time a statutory reference to subsistence hunting by Alaskan Natives.³ The amendment allows the Secretary of the Interior to adopt regulations permitting subsistence hunting by Alaskan Natives if the regulations are in accordance with the provisions of the four treaties. 16 U.S.C. § 712.

[6] Although the parties dispute whether the Fish and Wildlife Improvement Act requires the Secretary's regulations to be in accord with only the United States-USSR Convention or whether the regulations must be in accordance with all four treaties, the legislative history regarding the Fish and Wildlife Improvement Act makes clear that regulations permitting closed season subsistence hunting may not be adopted if they are contrary to any of the treaties. See S. Rep. No. 1175, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 7641 [hereinafter *Hearings*]. The legislative history shows, first, that Congress is in favor of permitting some subsistence hunting by Alaskan residents. The Senate Re-

³The relevant provision provides:

(1) In accordance with the various migratory bird treaties and conventions with Canada, Japan, Mexico, and the USSR, the Secretary of the Interior is authorized to issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds.

16 U.S.C. § 712(1).

port states that "the subsistence provisions of the three earlier treaties lack the administrative flexibility necessary to deal with the issue in a responsible manner. In contrast to these earlier inadequacies, the USSR convention contains the most modern and workable language on subsistence and avoids the errors of the past." *Hearings* at 7645. Second, the legislative history shows that Congress believed amendment of the treaties with Canada, Mexico, and Japan was necessary before regulations permitting subsistence hunting could be adopted. Senator Gravel, speaking in favor of the Fish and Wildlife Improvement Act before the Senate, stated that "*as soon as* these other treaties can be amended by our negotiators and ratified, we can at least put to rest one of the most longstanding, volatile issues facing rural Alaskan users of migratory birds." 124 Cong. Rec. 31,532 (1978) (emphasis added). Third, the statutory amendment was enacted in anticipation of treaty modifications that the executive was then seeking to negotiate. *See Hearings* at 7645. Congress wanted to avoid the necessity of amending the MBTA each time a treaty was amended. *Id.*

[7] The treaties with Canada, Mexico, and Japan have not been modified.⁴ Thus, the Secretary of the Interior is authorized to issue regulations permitting subsistence hunting, but only to the extent that the regulations are in accord with all four treaties.

[8] Subsistence hunting is regulated differently by each convention. The four treaties use different means to

⁴A protocol modifying the United States-Canada Convention was signed but never ratified by the Senate. *See* Protocol Amending the 1916 Convention with Canada for the Protection of Migratory Birds (January 30, 1979), S. Doc. Executive W, 96th Cong., 2d Sess. (1980).

designate which birds are protected by the particular treaty, but all treaties protect the migratory birds covered by the Hooper Bay Agreement and the 1985 Goose Management Plan. *See* United States-Canada Convention, art. I; United States-Mexico Convention, art. IV; United States-Japan Convention, Annex 38, 39, 41; United States-USSR, Appendix. *See also* 50 C.F.R. § 10.13 (1986). The United States-Canada Convention requires a closed season between March 10 and September 1 of each year and limits the open season to three and one-half months. *See* United States-Canada Convention, art. II(1). It contains exceptions for Indians and Eskimos, but these exceptions do not apply to the hunting of the birds named in the Hooper Bay Agreement or the 1985 Goose Management Plan. *Id.* at art. II(3). The United States-Mexico Convention does not set dates for a closed season, but states that the open season may not exceed four months each year. *See* United States-Mexico Convention, art. II(A), (C). The United States-Mexico Convention does not mention subsistence hunting by Alaskan Natives. The United States-Japan Convention does not require a specific closed season. Instead, it provides that each country shall set its hunting season "so as to avoid [the birds'] principal nesting seasons and to maintain their populations in optimum numbers." *See* United States-Japan Convention, art. III(2). A subsistence hunting provision is specifically included, but its application is restricted to "Eskimos, Indians and indigenous peoples of the Pacific Islands" if the taking is for their own food and clothing. United States-Japan Convention, *Id.* at art. III(1)(e). The United States-Soviet Union Convention explicitly provides for subsistence hunting by Alaskan Natives. *See* United

States-Soviet Convention, art. II(1)(c). It permits the Secretary to set a specific hunting season for subsistence hunting by Alaskan Natives. *Id.* at Art. II(2). This season must provide for the preservation and maintenance of stocks of migratory birds. United States-Soviet Convention, *Id.*

[9] The United States-Canada Convention is the most restrictive of the four treaties, and all of the Secretary's regulations must be in accord with that treaty. Therefore the Secretary may adopt regulations that permit subsistence hunting for up to three and one-half months between September 1 and March 10 of each year. Closed season subsistence hunting by Alaskan Natives is not permitted by the MBTA.

C. *The 1925 Alaska Game Law*

The district court held, however, that closed season subsistence hunting by Alaskan Natives is not regulated by the MBTA, but instead by the 1925 Alaska Game Law. It concluded that the 1925 AGL superceded the MBTA with respect to the hunting of migratory birds in Alaska and that the 1925 AGL prohibits the Secretary from adopting regulations restricting closed season subsistence hunting by Alaskan Natives. The district court held that this prohibition remains in force today.

The district court held that the 1925 AGL repealed the MBTA both by its plain language and by implication. The 1925 AGL regulated the hunting of various types of animals and birds in Alaska, including migratory game birds. 1925 AGL § 8. The Law created an Alaska Game Commission and delegated to the Commission substantial en-

forcement authority over hunting in Alaska. 1925 AGL §§ 4, 5. The Law provided that, unless permitted by it or regulations made pursuant to the 1925 AGL, it was unlawful to hunt migratory birds. 1925 AGL § 8. The Secretary of Agriculture was granted the authority to issue regulations permitting the hunting of game birds. 1925 AGL § 10.

The 1925 AGL was ambiguous as to its relationship with the MBTA. In section 10 it explicitly prohibited the Secretary from adopting regulations contravening the MBTA.⁵ Section 16 of the 1925 AGL, however, could be read as an implicit repeal of the MBTA as it applied to Alaska. Section 16 stated that preexisting legislation relating to the protection of birds in Alaska would only remain in force until ninety days after regulations had been issued pursuant to the 1925 AGL.⁶ The 1925 AGL also con-

⁵The relevant section reads in part:

nor, except as herein provided, shall [any regulation] prohibit any Indian or Eskimo, prospector, or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available, . . . but the Secretary by regulation may prohibit such native Indians or Eskimos, prospectors, or travelers from taking any species of animals or birds for food during the close season in any section of the Territory within which he shall determine that the supply of such species of animals or birds is in danger of extermination; nor shall any such regulation contravene any of the provisions of the migratory bird treaty Act and regulations.

1925 AGL § 10.

⁶Section 16 states:

[t]hat the provisions of existing laws relating to the protection of . . . birds, and nests and eggs of birds in the Territory shall remain in full force and effect until the expira-

(Continued on following page)

tained a provision in section 10 that prevented the Secretary from issuing regulations that prohibited Eskimos and Indians from taking birds during the closed season when other food was not available unless the Secretary determined that the particular species was in danger of extermination.

[10] The district court began its analysis by holding that the two clauses in section 10 conflict. One clause proscribed restrictions on emergency subsistence hunting. The other clause prohibited regulations conflicting with the MBTA. Because the MBTA prohibited all hunting of migratory game birds between March 10 and September 1 of each year and the 1925 AGL permitted emergency subsistence during the entire year, the district court found that the clauses conflicted. The district court resolved the conflict by concluding that the 1925 AGL superceded the MBTA with respect to the regulation of migratory bird hunting in Alaska. It found that the 1925 AGL was intended to "comprehensively regulate all game and bird hunting in Alaska and replace the MBTA as a source of authority for issuing regulations in Alaska. The court relied on section 8 of the 1925 AGL which stated all taking of game animals and birds was illegal unless permitted by this Act or by regulations made pursuant to this Act.⁷

(Continued from previous page)

tion of ninety days from the date of the publication of regulations of the Secretary of Agriculture adopted pursuant to the provisions of this Act.

1925 AGL § 16.

⁷Section 8 provides in relevant part:

[t]hat, unless and except as permitted by this Act or by regulations made pursuant to this Act, it shall be unlawful for

(Continued on following page)

From this statement the district court concluded that the general repealing clause in section 16 expressly repealed the MBTA insofar as the MBTA applied to Alaska. The district court attempted to harmonize section 16 with section 10's provision that the MBTA was not to be contravened. It held that the MBTA was incorporated by reference into the 1925 AGL and that the MBTA still applied to Alaska to the extent that it was not inconsistent with the 1925 AGL. In the alternative, the district court found that the 1925 AGL repealed the MBTA's applicability to Alaska by implication. It relied on the principle that ambiguities in statutes intended to benefit natives must be resolved in favor of natives and the principle that a specific locally oriented clause such as the emergency taking clause is presumed to control over a more general statute such as the MBTA.

When interpreting a statute, "we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984). It is a rule of statutory construction that "one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless." *Shields v. United States*, 698 F.2d 987, 989 (9th Cir.), *cert. denied*, 464 U.S. 816 (1983). "[W]e must examine the language of the statute and the particular con-

(Continued from previous page)

any person to take, possess, sell, offer to sell, purchase or offer to purchase any game animal, land fur-bearing animal, wild bird, or any parts thereof, or any nest or egg of any such bird,

1925 AGL § 8.

cerns which motivated Congress to pass it." *Hopi Tribe v. Watt*, 719 F.2d 314, 317 (9th Cir. 1983).

[11] It is possible to interpret the two clauses in section 10 so that they do not conflict and so that both provisions serve a purpose. The subsistence hunting provision fairly can be read to permit subsistence hunting of all animals and all birds which are not migratory. Emergency subsistence hunting of migratory birds would then be permissible insofar as it is permitted by the MBTA. Because the MBTA allows subsistence hunting of some migratory nongame birds, both clauses would be given effect.

The legislative history of the 1925 AGL does not clarify the relationship between these two clauses. *See* H.R. Rep. No. 993, 68th Cong., 1st Sess. (1924); S. Rep. No. 480, 68th Cong., 1st Sess. (1924). The legislative reports do not refer to subsistence hunting by Alaskan Natives or to the MBTA. The reports do, however, delineate the policies which Congress intended to promote by adopting the 1925 AGL. Among those policies were flexibility in meeting local needs and conservation of the natural resources of the area. *See e.g.*, S. Rep. No. 480 at 4. These policies support an interpretation of the emergency hunting provision that recognizes the emergency subsistence needs of Alaskan Natives but which also restricts the subsistence hunting of migratory birds.

If the two clauses of section 10 are not in conflict, the district court's conclusion that section 16 repealed all prior legislation specifically addressed to the Territory of Alaska but not legislation protecting animals nationwide, is called into doubt. We must ascertain and

give effect to the plain meaning of the statute. *See Kidd v. United States Dep't of Interior*, 756 F.2d 1410, 1412 (9th Cir. 1985). Because the statute specifically stated that the provisions of the MBTA were not to be contravened, the plain language of the statute suggests that section 16 did not repeal the MBTA insofar as it applied to Alaska.

The interpretation of the statute by the Secretary is also ambiguous, but it provides some guidance in determining Congress' intent when it adopted the 1925 AGL. We give great deference to the interpretation given a statute by the agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Although it is unclear how the agency initially interpreted the 1925 AGL, the agency's longstanding interpretation has been that Congress did not intend to permit subsistence hunting of migratory game birds or to have the 1925 AGL supercede the MBTA.

We are particularly deferential to the contemporaneous interpretation given to a statute by those responsible for its implementation. *See Watt v. Alaska*, 451 U.S. 259, 272-73 (1981); *Udall*, 380 U.S. at 16 (quoting *International Union of Elec. Radio & Machine Workers*, 367 U.S. 396, 408 (1961)). Four months after the 1925 AGL was passed, the Bureau of Biological Survey issued regulations implementing the 1925 AGL. *See U.S. Dept. of Agriculture, Bureau of Biological Survey, Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory*, issued May 1925. These initial regulations do not conclusively establish whether the agency believed emergency subsistence hunting was per-

missible or whether the 1925 AGL superceded the MBTA in Alaska. Regulation 8 permitted the taking of animals and birds by Indians and Eskimos who had not severed tribal relations if they were in absolute need of food.⁸

This regulation contained no limitations as to the time of year when subsistence hunting could take place or as to which birds could be hunted. The regulations also contained an introductory statement which stated that the 1925 AGL did not supersede the MBTA.⁹ While it is unclear what authority this introductory statement was intended to carry, its inclusion with the regulations shows an agency intent that the MBTA continue in effect. Thus,

⁸Regulation 8. Taking of Game by Prospectors, Travelers, and Certain Indians when in Need of Food

An Indian, Eskimo, or half-breed who has not severed his tribal relations by adopting a civilized mode of living or by exercising the right of franchise and an explorer, prospector, or traveler may take animals or birds in any part of the Territory at any time for food when in absolute need of food and other food is not available, but he shall not ship or sell any animal or bird or part thereof so taken.

U.S. Dept. of Agriculture, Bureau of Biological Survey, Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory, Issues May 1925.

⁹The regulations stated:

The Alaska game law (act of January 1925) and the regulations thereunder supersede all previous Federal laws and regulations for the protection of game animals, land fur-bearing animals, and birds in the Territory, except the *migratory-bird treaty act of July 3, 1918* (40 Stat. 755), the Lacey Act of May 25, 1900, as amended (31 Stat. 18-88; 35 Stat. 1137), and the law protecting animals and birds on Federal refuges (42 Stat. 98), and the regulations thereunder.

U.S. Dept. of Agriculture, Bureau of Biological Survey, Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory, Issues May 1925 (emphasis added).

the initial regulations show an intent to permit emergency subsistence hunting but to also follow the restrictive provisions of the MBTA.

The regulations issued pursuant to the MBTA in 1926, shortly after the 1925 AGL was enacted, continued to regulate the hunting of migratory birds in Alaska and to permit subsistence hunting of the migratory nongame birds as required by the United States-Canada Convention. *See* Presidential Proclamation of June 18, 1926, 44 Stat. 2579-81, *amending* Presidential Proclamation of July 31, 1918, 40 Stat. 1812-18. The MBTA regulations were not altered in any way to account for passage of the 1925 AGL. *See Id.*

[12] Subsequent administrative interpretation supports the view that the 1925 AGL did not supercede the MBTA and that the emergency hunting provision in the 1925 AGL did not govern the hunting of migratory game birds. First, regulations issued after 1926 under the MBTA have continued without exception to govern the hunting of migratory birds in Alaska. *See e.g.*, 50 C.F.R. § 20.102 (1986). The only subsistence hunting exceptions in the MBTA regulations are those authorized by the four treaties. *See id.* § 20.132.

Second, the Secretary of the Interior modified regulation 8 in 1944 to make clear that the regulation did not permit the taking of migratory game birds in contravention of the MBTA.¹⁰ The revised regulation resolved the

¹⁰See 50 C.F.R. § 91.3 (1944), *printed at* 9 Fed. Reg. 5270, 5271 (1944):

ambiguity that previously existed. Although we give less deference to a subsequent agency interpretation which conflicts with that agency's contemporaneous interpretation, see *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976), we do not believe that this case is one in which we need question the later interpretation. The revised regulation continued in force for the next sixteen years with only minor modifications. There is no evidence that the change in the regulation resulted from a changed interpretation of the 1925 AGL. Rather, it is likely that the revised regulation simply clarified the interpretation given to the statute initially.

Third, administrative action at the time Alaska became a state shows that both the agency and Congress believed that the MBTA governed subsistence hunting of migratory game birds in Alaska. Although the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958), *reprinted at* 48 U.S.C. prec. § 21, did not expressly repeal the 1925 AGL, the 1925 AGL was considered repealed under a general repealing clause. See 72 Stat. 339, § 8(d); see also Executive Order No. 10,857, 25 Fed. Reg. 33 § 1 (1960) (stating that functions performed by the United States

(Continued from previous page)

Taking animals, birds, and game fishes in emergencies. An Indian or Eskimo, or an explorer, prospector or traveler, may take animals, *birds except migratory birds*, or game fishes in any part of the Territory at any time for food when in need thereof and other sufficient food is not available, but he shall not transport or sell any animal, bird, game fish or part thereof so taken, and an Indian or Eskimo also may take, possess, and transport, at any time, auks, auklets, guillemots, murre, and puffins and their eggs for food, and their skins for clothing for his own use and that of his immediate family.

(emphasis added).

would cease to be performed as of Dec. 31, 1959); Proposed Rulemaking: General Revision of Fish and Wildlife Regulations, 25 Fed. Reg. 7681, (1960) (stating that the 1925 AGL's implementing regulations would be deleted because they were "superceded by operation of the Alaska Statehood Act"). We find no evidence that the repeal of the 1925 AGL authorized the State of Alaska to regulate the hunting of migratory game birds by Alaskan Natives. The federal government continued to regulate the subsistence hunting of migratory birds pursuant to the MBTA based on its belief that it had always had this authority.

We hold that the MBTA was not superseded in Alaska by the 1925 Alaska Game Law. The subsistence hunting provision in the 1925 AGL prohibited the adoption of regulations restricting subsistence hunting of animals and non-migratory birds in Alaska. Thus, the MBTA and not the 1925 AGL governs the hunting of migratory birds. The MBTA permits the Secretary to adopt regulations permitting subsistence hunting only to the extent that the hunting is permissible under the treaties with Canada, Mexico, Japan, and the Soviet Union. We reverse and remand to the district court to determine whether the Hooper Bay Agreeemnt and the 1985 Goose Management Plan are contrary to the MBTA.

CONCLUSION

We conclude that the Conservation Fund has standing to bring this action. This action is not moot, but our jurisdiction is limited under the APA to a review of the authority of the Fish and Wildlife Service to enter into the

Hooper Bay Agreement and the 1985 Goose Management Plan.

We hold that the MBTA governs the subsistence hunting of migratory birds in Alaska. The MBTA was not superceded by the 1925 AGL. As in force today, the MBTA permits the Secretary of Interior to adopt regulations permitting subsistence hunting of migratory game birds. These regulations may not, however, contravene the treaties with Canada, Japan, Mexico, or the Soviet Union. To the extent that the Hooper Bay Agreement and the 1985 Goose Management Plan conflict with the provisions of the four treaties, they are invalid.

REVERSED and REMANDED.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

ALASKA FISH AND WILDLIFE)
FEDERATION AND OUTDOOR)
COUNCIL, INC. and ALASKA)
FISH AND WILDLIFE)
CONSERVATION FUND, INC.,)
Plaintiffs,)

-s.)

ROBERT JANTZEN, Director,)
United States Fish and Wildlife)
Service, and DON COLLINS-)
WORTH, Commissioner, Alaska)
Department of Fish and Game,)
Defendants.)

and)

THE ALASKA FEDERATION)
OF NATIVES, THE ASSOCIA-)
TION OF VILLAGE COUNCIL)
PRESIDENTS, and STATE)
REPRESENTATIVE TONY)
VASKA,)
Intervenors/Defendants.)

**MEMORANDUM
AND
ORDER**

J84-013 CIV

I. Background

THIS CAUSE comes before the court on the parties' cross motions for summary judgment. It concerns issues

of game management and Native subsistence hunting in the Yukon-Kuskokwim delta. Four species of migrating birds, the cackling Canada goose, the emperor goose, the white-fronted goose, and the black brant, have suffered major declines in population over the last 20 years. All parties agree that unless these declines are reversed, the species' populations may fall to dangerously low levels. As of 1983, the estimated populations are as follows: cackling Canada goose—30,000; white-fronted goose—113,000; black brant—110,000; and emperor goose—71,000. Approximate estimates for 1984 are: cackling Canada goose—30,000; white-fronted goose—100,000; black brant—133,000; and emperor goose—71,000. These numbers are necessarily approximate, given that geese do not fill out census forms.

The Yukon-Kuskokwim delta is a major summer nesting ground for these species. The species traditionally have been hunted by Natives in the spring for subsistence, and this hunting continues. As explained by the Native intervenors, the arrival of the migrating birds represents the first available fresh meat after the long winter and they therefore are an important part of the Native diet. The evidence before this court indicates that this harvesting—along with hunting by sportsmen, loss of habitat, and natural predation—has been a major cause of the population decline.

Such spring hunting is potentially illegal under the terms of the migratory bird treaty between the United States and Canada and the Migratory Bird Treaty Act of 1918 (MBTA), which implements that treaty's provisions in the United States. *See* United States-Great Britain Convention for the Protection of Migratory Birds, August

16, 1916, 39 Stat. 1702, T.S. 628 (Canada Treaty); Migratory Birds Treaty Act of 1918, Ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (1982)). Both state and federal law enforcement officials have assumed spring taking of geese by Natives to be illegal, but in recent years virtually no effort has been made to enforce compliance. As was found by this court in denying plaintiffs' motion for preliminary injunction, traditional methods of enforcing game laws have not been effective in the vast reaches of rural Alaska for both political and geographical reasons.

In January, 1984, the Association of Village Council Presidents (AVCP), Alaska Department of Fish and Game (ADF&G), U.S. Fish and Wildlife Service (USFWS), California Department of Fish and Game, and two California sportsmen's groups tentatively agreed to a cooperative plan to reduce hunting of some species. This plan, called the Hooper Bay Agreement, called for no hunting or harvest of cackling Canadian geese and reduced hunting and harvest of white-fronted geese and black brants. Emperor geese were not included in the agreement for the reason that they do not migrate to California.

The Hooper Bay Agreement was replaced in 1985 by the Yukon-Kuskokwim Goose Management Plan. *See* Ex. A, Docket 96. In addition to continuing the hunting restrictions of the previous agreement, the plan also restricts sport and subsistence hunting of the emperor goose. Native leaders have worked closely with villages in the delta region to publicize it and encourage compliance.

Pursuant to the plan, the parties adopted monitoring, verification and enforcement procedures. Ex. B, Docket

96. Under these procedures, any suspected violations of it are to be reported to the USFWS, AVCP, and the ADF&G. These procedures further provide that the USFWS and ADF&G shall cite individual hunters for violations of the plan upon (1) a local village request; (2) recurring non-compliance or blatant violation; or (3) use of charter or private aircraft to assist in hunting. Other instances of non-compliance are responded to more informally. A cooperative team of AVCP, ADF&G and USFWS employees visits villages in response to reported violations to ensure compliance through education and information.

Initial reports indicate that the cooperative plan has been successful. *See, e.g.*, USFWS Report attached to Docket 119. There has been particularly strong support for the program from the Native community. Apparently, this had led to a major decline in the subsistence harvest of each of the species in question. The plan has also substantially reduced egg gathering activities. Of equal importance, because of the involvement of the Native community in the plan, increased enforcement, including the issuance of citations, has occurred.

Plaintiffs seek to have the court set aside the Goose Management Plan as well as what is known as the "Watson Policy" as violative of the MBTA and improperly promulgated. The "Watson Policy" refers to a policy memorandum written by the Alaska Area Director of USFWS in 1975. In this memorandum, he stated "that where there is a demonstrable need for the taking of migratory bird resources for subsistence purposes, the U.S. Fish and Wildlife Service will not recommend prosecution in Federal court for a violation of the Migratory Bird

Treaty Act during the statutory closed period." Memorandum of Gordon Watson to All Stations, Alaska Area, December 5, 1975, Plaintiffs' Exhibit A.

After plaintiffs filed this suit against the state and federal defendants, the Alaska Federation of Natives and the Association of Village Council Presidents moved for, and were granted, intervenor status. In their cross-claim, among other arguments, they allege that Congress had repealed the MBTA's prohibition on spring subsistence hunting in the Alaska Game Law of 1925, Ch. 75, 43 Stat. 739 (1925), and the Fish and Wildlife Improvement Act of 1978, § 3(h)(2), Pub. L. No. 95-616, 92 Stat. 3110, 3112 (1978) (codified at 16 U.S.C. § 712 (1982)). The court will address these claims first.

II. *Intervenors' Cross-Claim*

A. *The Canadian Treaty and the MBTA*

Prior to the passage of the MBTA, Congress had established a "subsistence" exception to the Alaska game laws. *See* Alaska Game Law of 1902, ch. 1037, 31 Stat. 327 (1902); Alaska Game Law of 1908, ch. 162, 35 Stat. 102 (1908). These laws allowed Natives to hunt game animals and birds at any time for food or clothing, and allowed miners and explorers to kill such game at any time when in need of food. *See* H.R. Rep. No. 951, 57th Cong., 1st Sess. 2 (1902).

The passage of the MBTA in 1918 apparently outlawed spring subsistence hunting of most migratory birds by Natives for the reason it created a closed season on migratory game birds between March 10 and September 1 of each year. The Act also left an extremely short to

non-existent fall hunting season for the Natives, as the geese leave the delta in or before September.

Intervenors initially allege that Congress did not intend the MBTA to apply to Alaska, or to repeal by implication the Alaska Game laws and their subsistence exceptions. The court disagrees, and finds that Congress intended the MBTA to apply to subsistence hunting in Alaska. First, the purpose of the MBTA was to implement the Canadian Treaty, a treaty clearly intended to include Alaska Natives within its scope. Article II, sec. 3 of the Treaty states:

The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, quillemots, murrees and puffins, and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

Although the Treaty's framers created a subsistence exception for migratory nongame birds, they created no similar exception for migratory game birds. This demonstrates the framers' intent that no subsistence exception exist for migratory game birds, and that the Treaty apply to Alaska.

The purpose of this exception was explained in a letter from the Secretary of Agriculture to the Secretary of State, dated March 10, 1916:

The word *other* is inserted before "migratory non-game birds" to differentiate this group from migratory insectivorous birds in Paragraph 2 and the proviso is added "*except that Eskimos and Indians may take at any season auks, auklets, quillemots, murrees, and puffins and their eggs for food and their*

skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale." This proviso affects primarily the Territories of Alaska and the coastal Provinces and Territories of Canada, where the natives have been accustomed since time immemorial to utilize certain sea birds for food and clothing. The clause follows essentially certain provisions already contained in the laws of Alaska and some of the Provinces of Canada and is inserted merely to prevent any hardship on the natives in these remote parts of the continent.

Federal Memorandum in Opposition to Intervenor's Motion for Summary Judgment, Ex. A.

Other factors further evidence that the MBTA applies to Alaska. First, by its own language, the MBTA applies to both "States" and "Territories." *See, e.g.,* MBTA § 7, 40 Stat. at 756. Second, an attempt by Mr. Sulzer, the delegate from Alaska to the House of Representatives, to amend the MBTA to create a subsistence exemption was voted down. *See* 55 Cong. Rec. 7457 (June 6, 1918) (comments of Rep. Sulzer). Last, regulations issued contemporaneous with the MBTA included Alaska within their scope. *See* Proclamation of July 31, 1918, 40 Stat. 1812; Proclamation of October 25, 1918, 40 Stat. 1863.

B. *The Alaska Game Law of 1925*

Intervenor further contends that the Alaska Game Law of 1925, ch. 75, 43 Stat. 739 (1925), created a "subsistence" exception to the MBTA. The Alaska Game Law of 1925 superseded the 1908 Game Law, and by its own terms, comprehensively regulates all hunting of game, including migratory birds, in Alaska. *See* Alaska Game Law of 1925, §§ 2, 8 and 10, 43 Stat. at 740, 743.

Section 8 of the Act prohibits all taking of game, including migratory birds, unless permitted by the Act or regulations made pursuant to it.¹ Section 10 of the Act authorizes the Secretary to issue comprehensive regulations to implement the Act, but then places certain restrictions on the scope and content of those regulations. Two of those restrictions are relevant to the issue before the court. First, the Act states that no regulation shall "prohibit any Indian or Eskimo, prospector or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available." Second, the Act requires that "nor shall any such regulation contravene any of the provisions of the migratory bird treaty Act and regulations."² The court finds

¹ Section 8, in relevant part, reads as follows:

Sec. 8. TAKING OF ANIMALS AND BIRDS RESTRICTED.—That, *unless and except as permitted by this Act or by regulations made pursuant to this Act*, it shall be unlawful for any person to take, possess, transport, sell, offer to sell, purchase, or offer to purchase any game animal, land fur-bearing animal, wild bird, or any parts thereof, or any nest of egg of any such bird . . . : Provided, that nothing in this Act shall be construed to prevent the collection or exportation of animals, birds, parts thereof, or nests or eggs of birds for scientific purposes, or of live animals, birds, or eggs of birds, for propagation or exhibition purposes, under a permit issued by the Secretary of Agriculture and under such regulations as he may prescribe. . . . (Emphasis added).

² The relevant language of the statute reads as follows:

Sec. 10. *Regulations.*—That the Secretary of Agriculture, upon consultation with or recommendation of the [Alaska Game] commission, is hereby authorized and directed from time to time to determine when, to what extent, if at all, and by what means . . . game birds, nongame birds, and nests or eggs of birds may be taken, possessed, transported,

(Continued on following page)

that these two sections cannot be reconciled. The issue thus is whether the "emergency taking" clause must be read as an exception to the MBTA, i.e., the MBTA applies except for emergency taking, or whether the MBTA excludes migratory birds from an emergency taking exception.³ To solve this problem, the court must divine the Congressional intent behind the 1925 Act. Fortunately for the court, the structure of the Act contains a number of indications of that intent.

(Continued from previous page)

caught, or sold, and to adopt suitable regulations permitting and governing the same in accordance with such determinations. . . .

. . . .

but no such regulation . . . except as herein provided, shall prohibit any Indian or Eskimo, prospector, or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available, but the shipment or sale of any animals or birds or parts thereof so taken shall not be permitted, except that the hides of animal so taken may be sold within the Territory, but the Secretary by regulation may prohibit such native Indians or Eskimos, prospectors, or travelers from taking any species of animals or birds for food during the close season in any section of the Territory within which he shall determine that the supply of such species of animals or birds is in danger of extermination; nor shall any such regulation contravene any of the provisions of the migratory bird treaty Act and regulations.

Alaska Game Act of 1925, § 10, 43 Stat. at 743-44.

³ Initially, the court finds that the "emergency exception" in the 1925 Act to be a positive grant of authority to natives, prospectors, and travelers to harvest game when in need. To read it otherwise would rob the section of any meaning or effect.

First, the court finds that Congress intended the 1925 Act to comprehensively regulate all game and bird hunting in Alaska and replace the MBTA as a source of authority for issuing regulations in Alaska. Section 8, for example, makes all taking of birds illegal, "except as permitted by this Act or by regulations made pursuant to this Act." The plain meaning of this language is that Congress no longer intended the MBTA to be a statutory authority for migratory bird regulations.

Section 10 of the Act further evidences Congressional intent that all future regulation of migratory birds in Alaska be pursuant to it and not to the MBTA. Section 10 gives the Secretary comprehensive authority to regulate taking of migratory birds. *See* footnote 2 *supra*. The final proviso of the section further supports this view. It states:

nor shall any regulation contravene any of the provisions of the migratory bird treaty Act and regulations.

If Congress had intended migratory bird regulations to be promulgated under the MBTA, it would not have been necessary for Congress to order the Secretary not to issue regulations in conflict with it. Rather, the proviso indicates that Congress expected the Secretary to issue new regulations on migratory birds under the 1925 Act and not under the MBTA.

Section 16 of the 1925 Act further demonstrates that Congress intended it to supersede the MBTA as the basis

of bird regulation.⁴ Assuming that the MBTA superseded the 1908 Act, the MBTA would have been the primary source of bird regulation in Alaska at the time of the 1925 Act. If Congress had intended the MBTA to continue to be in effect in Alaska as an independent basis for regulation after the passage of the 1925 Act, it would not have repealed its applicability to Alaska in section 16. *See* discussion below.

While Congress intended all regulation of bird hunting in Alaska to be pursuant to the 1925 Act, nevertheless the terms of the MBTA were incorporated into it by reference, and any regulation under the 1925 Act was to be consistent with the MBTA. The question thus arises whether the 1925 Act repealed the MBTA as it applied to Alaska in any manner. Such a repeal could be either express or implied. 1A Singer, *Sutherland Statutory Construction* (Sands Fourth Edition 1985 Revision) § 23.07.

First, the court finds that section 16 of the 1925 Act expressly repealed the MBTA insofar as it applied to Alaska. This section voids all previous enactments relating to the protection of birds in Alaska. Given that Congress was aware of the MBTA when this section was enacted (see the section 10 proviso), the language's plain meaning is that Congress intended to include the MBTA

4

Sec. 16. *Existing Legislation Continued in Force Temporarily.*—That the provisions of existing laws relating to the protection of game and fur-bearing animals, *birds, and nests and eggs of birds* in the Territory shall remain in full force and effect until expiration of ninety days from the date of publication of regulations of the Secretary of Agriculture adopted pursuant to the provisions of this Act.

Alaska Game Act of 1925 § 16, 43 Stat. at 747 (emphasis added).

within the term "existing legislation."⁵ Additionally, such a result—that all previous acts are void irregardless of consistency—accords with the conclusion reached above that Congress intended the 1925 Act to be the comprehensive source of regulation for all bird hunting in Alaska. Nevertheless, since the 1925 Act incorporates the terms of the MBTA by reference, the MBTA still applied to Alaska to the extent it was not inconsistent with the other terms of the 1925 Act. However, this application was through its incorporation into the vehicle of the 1925 Act.

Second, the court finds that the 1925 Act repealed the MBTA's applicability to Alaska by implication at least so far as it is contrary to the 1925 Act's subsistence exemption. As stated by the Supreme Court,

It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal "must be clear and manifest." It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States*, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy."

This clause is not a "general repealing clause." See 1A Singer at § 23.08; *Hess v. Reynolds*, 113 U.S. 73, 79 (1885); *Henderson's Tobacco*, 78 U.S. (11 Wall.) 652 (1870). Section 16 does not merely void prior legislation to the extent it was inconsistent. Rather, all previous enactments are voided, irregardless of consistency.

United States v. Borden Co., 308 U.S. 188, 198-96 (1939) (citations omitted). Thus, where a particular local law conflicts with an earlier general law of nationwide application, the special or local law will supersede the general enactment to the extent they are inconsistent. 1A Singer at § 23.16.

To determine whether there is an inconsistency between the 1925 Act and the MBTA, the court must first determine the relationship between the conflicting clauses in section 10 in the 1925 Act. The court finds both cannot simultaneously be given their full scope. If the penultimate emergency need⁶ clause is given its plain meaning, then the word "birds" within the exception would apply to both migratory and non-migratory birds and contravene the MBTA. If, however, the MBTA clause is given precedence, then the emergency need exception only applies to non-migratory birds, not all birds as its language suggests.

A number of factors show that Congress intended the emergency need exception to take precedence. While no one of these factors is conclusive, the weight of all the factors supports the conclusion. First, the plain language of the emergency need exception compels this result. Congress shows it knew how to distinguish between different types of birds elsewhere in the 1925 Act. Its failure to do so here is evidence that it intended the exception to include all birds.

⁶

As noted below, the emergency exception was expanded to a broader subsistence exception in 1940.

Second, the emergency need proviso states that “[no regulation] . . . shall prohibit any Indian or Eskimo to take . . . birds during the close season when he is in absolute need of food. . . .” This direct grant of authority under the statute allows Natives to undertake subsistence hunting, even absent implementing regulations.⁷ The MBTA clause only applies to *regulations* issued pursuant to the 1925 Act. Consequently, it must be presumed that the MBTA was not meant to apply to taking for subsistence/emergency needs, which was permitted without regulation.

Third, the court places great weight on the contemporaneous interpretation given to the 1925 Act by the Department of Agriculture, the agency charged with issuing regulations. In May 1925, four months after the Act’s passage, the Department issued regulations that interpreted the Act as creating an “emergency” exception to the MBTA. See U.S. Dept. of Agriculture, Bureau of Biological Survey, *Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory*, issued May 1925 (Federal Defendants’ exhibit “E”, Intervenor’s Exhibit “J”). Regulations 12 and 13 created seasons and set bag limits for migratory birds. Regulation 8, however, provided an absolute exception to those limits, providing:

7

This position is further supported by the subsection of the emergency need proviso that allows the Secretary “by regulation” to limit such taking in event of species decline. The implication is that, absent such regulation, emergency need taking is allowed.

REGULATION 8.—TAKING OF GAME BY
PROSPECTORS, TRAVELERS,
AND CERTAIN INDIANS
WHEN IN NEED OF FOOD

An Indian, Eskimo, or half-breed who has not severed his tribal relations by adopting a civilized mode of living or by exercising the right of franchise and an explorer, prospector, or traveler may take animals or birds in any part of the Territory at any time for food when in absolute need of food and other food is not available, but he shall not ship or sell any animal or bird or part thereof so taken.

This interpretation prevailed for 19 years, until 1944 (*See below.*)

Fourth, the court relies on the principles of statutory interpretation that ambiguities in statutes intended to benefit Natives must be resolved in favor of the Natives, and that the emergency clause, being the more specific, locally-oriented clause, is presumed to control over the MBTA, the more general statute. *See, e.g., Morton v. Mancari*, 417 U.S. 540, 550-51 (1974). Last, reading the “emergency” exemption as controlling is logical as well. It would be reasonable to assume that, given an “absolute” need for food, Congress would intend that all type of game be available for taking to avoid starvation.

Based on the above factors, the court finds that Congress intended the “emergency need” provision to create an exception to the MBTA rather than the other way around. Consequently, the 1925 Act, at least to the extent of that provision, is repugnant to the MBTA and impliedly repeals the MBTA to the extent of that inconsistency.

C. *The 1940 "Subsistence" Amendment and the 1943 Game Act*

In 1940, Congress expanded the "emergency" provision in the 1925 Act to create a broader subsistence exception. The 1925 Act had created a narrow subsistence exception, under which a Native could take game and birds out of season "when in absolute need of food and other food is not available." Federal agencies apparently interpreted this standard narrowly to prosecute Natives for hunting game out of season.⁸ In order to reconfirm that the "need" exception was intended to apply to subsistence hunting, Congress amended section 10 of the 1925 Act to allow Natives to take birds and animals out of season "when . . . in need of food and other sufficient food is not available." Act of October 10, 1940, ch. 845, 54 Stat. 1103-04; H. Rep. No. 2746, 76th Cong. 3d Sess. (1940). Thus, to the extent that the 1925 Game Act survived statehood, it survived in this broader form.⁹

D. *The 1944 Regulation*

In 1944, the USFWS amended the subsistence regulation to exclude migratory birds from its scope. As rewritten, the regulation read:

8

The major area of dispute was deer hunting in southeast Alaska.

9

The 1925 Act was reenacted, with amendments not relevant here, in 1943. Act of July 1, 1943, ch. 183, 57 Stat. 301. This reenactment is important in one sense, however. At the time of reenactment, Congress had before it the long-standing regulation allowing subsistence hunting of migratory birds. Congress' failure to clarify the statute's language demonstrates its acceptance of that regulatory interpretation and must be seen as a ratification of the regulation.

An Indian or Eskimo, or an explorer, prospector, or traveler, may take animals, birds (*except migratory birds*), or game fishes in any part of the territory at any time for food when in need thereof and other sufficient food is not available, but he shall not transport or sell any animal, bird, game fish, or part thereof so taken; and an Indian or Eskimo also may take, possess, and transport, at any time, auks, auklets, guillemots, murre, and puffins and their eggs for food, and their skins for clothing, for his own use and that of his immediate family.

9 Fed. Reg. 5270 (May 15, 1944) (emphasis added). When an administrative agency changes its interpretation of a statute after a long period of time, the court must give far more credence to the original interpretation than the later reinterpretation. *See Watt v. Alaska*, 451 U.S. 259, 272-73 (1981). The court finds that the reinterpretation here was contrary to law, and the prior interpretation correct. Accordingly, it is the 1925 Act and not the 1944 regulation that controls.

E. *Alaska Statehood Act*

The federal defendants argue that even if the 1925 Act repealed the MBTA by implication the 1925 Act was in turn "superseded" or "rendered obsolete" by the Alaska Statehood Act, thus reviving the MBTA. *See Alaska Statehood Act*, Pub. L. 85-508, 72 Stat. 339 (1958). Section 6(e) of the Statehood Act states:

All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska Game Law of July 1, 1943, [the 1925 Alaska Game Law, as amended], and

under the provisions of the Alaska commercial fisheries laws of June 26, 1906 [citation omitted] and June 6, 1924 [citation omitted] as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate federal agency; *Provided*, that the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety calendar days after the Secretary of the Interior certifies to the Congress that the Alaska State legislatures has made adequate provision for the administration, management, and conservation of said resources in the broad national interest * * *.

Federal defendants admit there was never an express repeal of the 1925 Act. *See generally* Alaska Omnibus Act, Pub. L. 86-70, 73 Stat. 141 (1959) (act repealing laws made obsolete by Statehood Act). However, if a statute was not expressly repealed, any repeal (at least under the facts of this case) must have occurred through repeal by implication.

1. *Express Repeal*

Although not mentioned by the parties, there in fact was an express repeal of the 1925 Act. *See* Fish and Game Code of Alaska, Ch. 94, 1959 Session Laws of Alaska, Art. IV, § 1. For the reasons stated below, this repeal did not affect that portion of the 1925 Act that regulated migratory birds.

This repeal by the Alaska State Legislature presumably was under the authority granted it by section 8(d) of the Alaska Statehood Act. This section allowed the state to modify or repeal Territorial laws, that is "all

laws or parts thereof enacted by the Congress the validity of which is dependent *solely* upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the union." See generally *Metlakatla Indian Community v. Egan*, 362 P.2d 901, 922 (Alaska 1961), *vacated on other grounds*, 369 U.S. 45 (1962) (discussing effect of § 8(d)).

This statute did not effectively repeal the 1925 Act's subsistence exception to the MBTA for two reasons. First, that portion of the 1925 Act that regulated migratory birds was not a law "the validity of which is dependent *solely* upon the authority of Congress to provide for the government of Alaska. . . ." Rather, that regulation's validity was equally based on the authority of Congress to implement treaties. See *Missouri v. Holland*, 252 U.S. 416 (1920). The fact that Congress incorporated the terms of the MBTA, which was based on Congress' treaty power, into the 1925 Act by reference clearly demonstrates Congress' intent to rely on its authority. Additionally, Congress in the 1925 Act chose, for humanitarian reasons, not to enforce the 1916 Canadian treaty against Natives in need of food. Although this exception was contrary to the terms of the treaty, Congress nevertheless was acting under its authority to implement the treaty when it decided to implement it only partially.

Second, even after statehood, the authority to manage migratory birds remained an area of federal regulation, and such authority was not passed to Alaska. See Federal opposition brief, Docket 70, at 38. The reason for this appears in a letter written by the Department of the Interior that appears in a Senate Report on Alaska statehood:

[The Statehood Act] would transfer to the State of Alaska the same jurisdiction and control over the fisheries and wildlife therein as are possessed and exercised by the existing States within their territorial limits and adjacent waters. Authority over matters affecting migratory birds would not be transferred, since this is a subject which is governed by Federal law throughout the Union. . . . [This situation] involve[s] the discharge of international commitments, undertaken by the United States through treaty or convention.

S. Rep. No. 1929, 81st Cong., 2d Sess. 14 (1950). Accordingly, given that regulation of taking of migratory birds is an area of federal primacy, the Statehood Act's § 8(d) did not give the state the authority to repeal federal policy in the area.

2. *Repeal by Implication*

The Statehood Act also did not impliedly repeal the 1925 Act's regulation of migratory birds. As noted above, in order for there to be repeal by implication, there must be actual inconsistency or repugnance between statutes. If implied repeal is to be present here, such inconsistency must be found in section 6(e) of the Statehood Act, which transferred the administration and management of fish and wildlife resources to Alaska. However, authority over regulation of migratory bird takes was not transferred to Alaska (*see above*). It therefore cannot be shown that there was the transfer of any authority to the state that would be inconsistent with continued federal management of migratory birds under the 1925 Act.

F. The Fish and Wildlife Improvement Act of 1978

The court declines to address whether the Secretary has authority to issue regulations pursuant to the Fish and Wildlife Improvement Act of 1978, § 3(h)(2), Pub. L. No. 95-616, 92 Stat. 3112 (1978) (codified at 16 U.S.C. § 712(1) (1982)). There is no case or controversy in this area. Any opinion would be advisory in nature, the issues not being ripe for decision.

G. Conclusion

In conclusion, the court finds that the MBTA's direct regulation of migratory birds in Alaska was repealed by the 1925 Act. However, since the 1925 Act incorporates the terms of the MBTA by reference, the net result is that the MBTA's terms, except for subsistence situations, continue to apply. Such regulation is pursuant to authority granted the Secretary by the 1925 Act. The court further finds that the Statehood Act did not transfer authority over migratory birds to Alaska, and that therefore the 1925 Act's provisions on migratory birds continue in effect. In the absence of regulation to the contrary, subsistence hunting of migratory birds for nutritional (as opposed to cultural or other) needs remains legal.

III. Plaintiffs' Claims

A. The Hooper Bay Agreement

Plaintiffs allege that the Hooper Bay Agreement was adopted in violation of a number of statutes and that its adoption was arbitrary and capricious. Because the Hooper Bay Agreement has been superseded by the 1985 Yukon-

Kuskokwim Delta Goose Management Plan, these claims must be dismissed as moot.

B. The Watson Non-Enforcement Policy

The Watson policy of December 5, 1975, purported to define circumstances in which the U.S. Fish and Wildlife Service would forebear to enforce the MBTA against subsistence users. Plaintiffs challenge this declaration of policy on a variety of procedural and substantive grounds. Because this court holds that the MBTA does not apply to the subsistence takings addressed by the policy, the forbearance promised by the Watson Non-Enforcement Policy is irrelevant. To invalidate the policy would not affect enforcement—there can be none—or remedy the injuries of which plaintiffs complain. Accordingly, the claims relating to the validity of this policy are moot.¹⁰

C. The 1985 Yukon-Kuskokwim Delta Goose Management Plan

1. APA

Plaintiffs apparently contend that the current Goose Management Plan (GMP) constitutes a regulation adopted without compliance with the Administrative Procedure Act. Portions of the GMP are not self executing; the proposed restrictions on sport hunting, for example, were not intended to become effective without separate promul-

¹⁰

Alternatively, the lack of redressability of plaintiffs' alleged injury may be viewed as vitiating standing. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). What is clear is that no case or controversy exists with respect to the Watson policy.

gation of appropriate regulations. Plaintiffs, however, challenge the agreement only insofar as it allegedly restricts agency discretion with respect to enforcement of the MBTA against subsistence users and delegates enforcement responsibility to the Association of Village Council Presidents (AVCP).

This claim is mooted by this court's holding regarding the reach of the MBTA. In essence, the subsistence-enforcement aspect of the GMP has become a mere statement of intent by the AVCP to enforce the plan voluntarily. The Fish and Wildlife Service cannot enforce the MBTA against bona fide subsistence users in the Delta, and its promises to refrain from doing so under certain conditions are irrelevant. Thus, the GMP is no longer a "promise" to withhold enforcement of the MBTA.

2. NEPA

For the same reason, plaintiffs' National Environmental Policy Act (NEPA) claim regarding the GMP is also moot. Given the irrelevance of the federal promises not to enforce, the subsistence aspect of the GMP is not the major federal action required to trigger NEPA. 43 U.S.C. § 4332(c). Moreover, it would be futile to order an EIS for a government declaration regarding application and enforcement of an act it has no power to enforce.

It is conceivable that the GMP as a whole could trigger the EIS requirement, even though much of it is not self-executing and subsequent implementing regulations might be promulgated only after issuance of their own EIS's. When the moot MBTA-enforcement aspect of the plan is removed, what remains is a plan in which state

and federal governmental parties propose interrelated actions to reduce sport hunting take, and which the AVCP states on behalf of its constituents a plan to reduce subsistence take on a voluntary basis. Even if NEPA applies to the GMP as a whole, however, it must be remembered that plaintiffs' alleged injury grows solely out of subsistence hunting and egging. The Fish and Wildlife Service's acceptance of voluntary concessions regarding that legal take has caused plaintiffs no injury in fact; in other words, the alleged injury from subsistence take is not "fairly traceable" to the action occurring here, i.e., voluntary reduction in subsistence take. *Cf. Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 (1977). Moreover, invalidation of the GMP would not redress plaintiffs' injury. *See Simon, supra*. Plaintiffs are therefore without standing to raise NEPA issues growing out of the GMP.¹¹

3. Yukon Delta National Wildlife Refuge/ ANILCA Claims

Section 303(7)(B) of the Alaska National Interest Land Conservation Act (ANILCA) sets forth the purposes for which the Yukon Delta National Wildlife Refuge shall be managed. 94 Stat. 2392. Sub-parts (ii) and (iii) of the above section create the following purposes for the refuge:

11

Even if plaintiffs had standing to raise the NEPA issues and prevailed on those issues, it is likely that the "exceptional circumstances" doctrine would preclude issuance of an injunction pending completion of the EIS. *See American Motorcyclist Ass'n v. Watt*, 714 F.2d 963, 966-97 (9th Cir. 1983).

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local rural residents;

There is no evidence that Congress intended to prevent any taking of migratory birds in the refuge. Such an intent would conflict with Congressional intent in passing section 3(h)(2) of the FWIA. *See* 16 U.S.C. § 712(1) and associated legislative history. In any event, the Canadian government has agreed to amend the 1916 treaty to allow some subsistence hunting of migratory birds. Thus, allowing subsistence hunting does not conflict with the purpose of any treaty obligation. On the other hand, if this section is read as prohibiting all subsistence hunting of migratory birds, section (iii) becomes devoid of meaning, as practically all birds within the refuge are migratory and thus would not be subject to subsistence take.

IV. *State's Motion to Dismiss Counts IV² and VII and Part of Count I*

Plaintiffs have not opposed the state's motion to dismiss their state law claims. The motion is deemed well taken and granted. Local Rule 5(B)(4).

Accordingly, IT IS ORDERED:

(1) THAT the intervenors' cross-motion for summary judgment on their cross claims is granted in part and denied in part as set forth above.

(2) THAT the state's motion to dismiss Counts IV, VII and part of Count I of plaintiff's complaint is granted;

(3) THAT the various parties' motions to dismiss/
grant summary judgment on plaintiffs' claims are granted;

(4) THAT plaintiffs' motion for partial summary
judgment is denied;

(5) THAT plaintiffs' motion to vacate stay is denied
as moot;

(6) THAT the federal defendants' cross-motion for
summary judgment against intervenors is denied in part
and granted in part, as set forth above.

DATED at Anchorage, Alaska, this 24th day of Jan-
uary, 1986.

/s/ James A. von der Heydt
United States District Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

ALASKA FISH AND WILDLIFE)
FEDERATION AND OUTDOOR)
COUNCIL, INC. and ALASKA)
FISH AND WILDLIFE)
CONSERVATION FUND, INC.,)

Plaintiffs,)

vs.)

ROBERT JANTZEN, Director,)
United States Fish and Wildlife)
Service, and DON COLLINS-)
WORTH, Commissioner, Alaska)
Department of Fish and Game,)

Defendants.)

and)

THE ALASKA FEDERATION)
OF NATIVES, THE ASSO-)
CIATION OF VILLAGE)
COUNCIL PRESIDENTS, and)
STATE REPRESENTATIVE)
TONY VASKA,)

Intervenors/Defendants.)

**FINAL
JUDGMENT**

J84-013 CIV

IT IS ORDERED AND ADJUDGED:

(1) THAT judgment is granted intervenors on paragraph (c) of their prayer for relief in their cross-claim.

The court holds that until such time as the Secretary of the Interior adopts regulations pursuant to section 3(h)(2) of the Fish and Wildlife Improvement Act, the Congress has authorized Alaska Natives to harvest migratory waterfowl under the Alaska Game Act of 1925 (as amended) during any season of the year, including but not limited to the spring and summer months, when they or members of their family are in need of food and other sufficient food is not available.

Intervenors claim in paragraph (a) and (b) of their cross-claim are dismissed as unripe.

(2) THAT all plaintiffs' claims are dismissed.

DATED at Anchorage, Alaska, this 24th day of January, 1986.

/s/ James A. von der Heydt
United States District Judge

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

ALASKA FISH & WILDLIFE)
FEDERATION & OUTDOOR)
COUNCIL, INC., a non-profit)
Alaska corporation, and)
ALASKA FISH & WILDLIFE)
CONSERVATION FUND, INC.,)
a non-profit Alaska corporation,)

Plaintiffs,)

vs.)

ROBERT JANTZEN, Director of)
the U.S. Fish & Wildlife Service,)
and DONALD COLLINSWORTH,)
Commissioner of the Alaska)
Department of Fish & Game,)

Defendants,)

and)

ALASKA FEDERATION OF)
NATIVES, THE ASSOCIATION)
OF VILLAGE COUNCIL)
PRESIDENTS, and State)
Representative TONY VASKA,)

Intervenors.)

**SUPPLEMENTAL
MEMORANDUM
AND ORDER**

J84-013 CIV

THIS COURT issued an order denying plaintiffs' motions for a temporary restraining order and preliminary

ction May 25, 1984. The court now sets forth supplemental findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Findings of Fact.

1) The Yukon-Kuskokwim Delta is the summer breeding ground for many species of waterfowl, including the Lesser Canada Goose, the Pacific white-fronted goose, the Pacific black brant, and the emperor goose.

2) The populations of the four species listed above have experienced a marked decline, caused in part by the harvesting of these species by Natives living in the Delta.

3) Such harvesting by Natives is potentially illegal under the United States—Great Britain Convention for the Protection of Migratory Birds, August 16, 1916, 39 Stat. 1702, T.S. 628, and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-11 (1982). (This is an issue in this case.) Federal law enforcement officials have assumed that Native harvesting of these species are illegal under these laws, virtually no effort has been made to enforce compliance.

4) In January, 1984, the Association of Village Council Presidents (AVCP), Alaska Department of Fish and Game, U.S. Fish and Wildlife Service, the California Department of Fish and Game, and two California sportsmen's groups agreed to a cooperative plan to reduce the hunting of some species. This plan, called the Hooper Agreement, calls for no hunting or harvesting of the Lesser Canada geese and reduced hunting and harvesting of white-fronted geese and black brants. Emperor geese

ded in the agreement for the reason that
grate to California.

tiffs seek to invalidate the Hooper Bay
illegal and to enforce the total hunting
ring and summer contained in the Migra-
ty Act.

e is a public interest in both protecting the
estyle of the Natives and protecting the
the bird species listed above.

Hooper Bay Agreement represents the first
effort to stop the decline of the species
Hooper Bay Agreement. Kelso aff. ¶ 12.

Hooper Bay Agreement, if enforced, is like-
e populations of cackling Canadian geese,
and white-fronted geese recover. Timm aff.

ditional methods of enforcing game laws have
tive in protecting these species for political
cal reasons. See Wolfe aff. ¶ 3; Kelso aff.
aff. ¶ 7. The cooperative approach em-
Hooper Bay Agreement is likely the best
forcing hunting restrictions of wildfowl in
ive compliance. Kelso aff. ¶¶ 3, 7-11; Riffe
Wolfe aff. ¶¶ 16, 19.

quiring agencies to enforce game laws in a
anner or voiding the Hooper Bay Agreement
to improved protection for the species cov-
greement, and in fact may cause increased
t of those species. Jones aff. ¶ 10; Williams

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DATED

1984.

is a public interest in fostering cooperatives, different government agencies, and conservation groups regarding management aff. ¶¶ 22-24.

ing the implementation of the Hooper at this time will harm the spirit of co-existence existing between the Natives, government and sports hunting groups. Jones aff.

may be some shift of hunting pressure possible. This shift, at least over the next sufficient to create any danger of population to endanger the species. Riffe aff. 8.

Law

standard for issuing injunctive relief and provisions of law are set forth in this court's

ing, arguendo, that defendants violated holds that no injunction should issue on issuing an injunction will not protect and in fact may further jeopardize them. *Motorcyclist Ass'n v. Watt*, 714 F.2d 962,).

Filings

all return the docket sheet and case file Juneau. All parties shall file future motions in Juneau until further order.

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Alaska, this 4th day of June,

James A. von der Heydt
United States District Judge

ACT

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mals, birds, fish, etc.

by sections 192, 193,
ations made pursuant
or any person to take,
purchase, or offer to
nal, game fish, game
ereof, or any nest or
damage, or destroy
That nothing in said
t the collection or ex-
es, birds, parts there-
entific or educational
ishes, birds, or eggs
on purposes, under a
suant to regulations
by the Secretary.

n; taking game for
protection of govern-
ister or enforce this

n with or recommen-
horized and directed
to what extent, if at
s, fur animals, game
gs of birds, and game
nsported, bought, or

sold, and to adopt suitable regul-
erning the same in accordance
which regulations shall become
cified therein; but no such re-
person to take any female ye-
fawn deer, or any female or la-
under permit for scientific, p-
educational purposes; or to us-
animals; or to sell the heads, h-
animals, except the hides of
mountain goat, or skins of bla-
tions may permit to be sold unc-
Secretary may deem to be appr-
gun larger than a number 10 g-
or steam or power launch, or a-
pelled by paddle, oars, or pole,
game birds; or to sell any gar-
parts thereof to the owner, m-
coastal or river steamer or cor-
or to procure for serving or t-
mals, game birds, or parts th-
the employees on any such st-
as herein provided, shall prob-
prospector, or traveler to tak-
fishes during the closed season
and other sufficient food is not
or sale of any animals, birds
thereof so taken shall not be
hides of animals so taken may l-
but said Secretary by regulati-
Indians or Eskimos, prospecto-
any species of animals, birds, c-

ting and gov-
terminations,
the date spe-
l permit any
moose, any
sheep except
exhibition, or
taking game
of any game
ou, deer, and
h the regula-
ctions as said
use any shot-
any aircraft,
than one pro-
e animals or
ame birds, or
mployee of any
r or sailboat,
uch game ani-
cannery or to
; nor, except
n or Eskimo,
rds, or game
need of food
the shipment
hes, or parts
cept that the
the Territory,
it such native
s from taking
for food dur-

sue, disturb, hunt, capture, trap, or kill such animals or game fishes, or setting or using a net, trap, or other device for taking them, or collecting the nests or eggs of such birds, unless the context otherwise requires. However the taking of animals, birds, or nests or eggs of such animals, birds, or game fishes is permitted, reference is had to the lawful means and in lawful manner.

* * *

Game birds: Anatidae, commonly known as waterfowl, including ducks, geese, brant, and swans; Haematidae, Charadriidae, Scolopacidae, and Phalaropodidae, commonly known as shorebirds, including oyster-catchers, sandpipers, snipe, curlew, and phalaropes; Gruidae, commonly known as crane; and the several species of ptarmigan, and such other birds as have been or hereafter be transplanted, introduced, or reintroduced into the Territory, or any part thereof, and found and declared by the Secretary to be game birds.

MIGRATORY BIRD TREATY ACT

16 U.S.C. §§ 703-711

§ 703. Taking, killing, or possessing migratory birds or game fishes in lawful manner

Unless and except as permitted by regulation or order of the Secretary as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner to pursue, hunt, take, capture, kill, attempt to take, attempt to kill, possess, offer for sale, sell, offer to barter, offer to purchase, purchase, deliver for shipment, export, import, port, import, cause to be shipped, exported or

determinations, which regulations shall become effective when approved by the President.

FISH AND WILDLIFE IMPROVEMENT ACT

16 U.S.C. § 712

§ 712. Treaty and convention implementing regulations, seasonal taking of migratory birds for essential needs of indigenous Alaskans to preserve and maintain stocks of the birds; protection and conservation of the birds

(1) In accordance with the various migratory bird treaties and conventions with Canada, Japan, Mexico, and the Union of Soviet Socialist Republics, the Secretary of the Interior is authorized to issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds.

